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In the Supreme Court of the United States

OCTOBER TERM, 1978

CECIL D. ANDRUS, SECRETARY
OF THE INTERIOR, ET AL., PETITIONERS

v.

GLOVER CONSTRUCTION COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior and the other appellants below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-31a) is reported at 591 F.2d 554. The opinion of the district court (App. D, *infra*, 34a-58a) is reported at 451 F. Supp. 1102.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 32a) was entered on January 11, 1979, and

the Secretary's petition for rehearing was denied on March 12, 1979 (App. C, *infra*, 33a). On May 30, 1979, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including July 10, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Buy Indian Act, 25 U.S.C. 47, authorizes the Secretary of the Interior to enter into road construction contracts with Indian-owned companies without publicly advertising pursuant to the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 253.

STATUTES INVOLVED

The Buy Indian Act, 25 U.S.C. 47, provides:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

Section 302 of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 252, provides in pertinent part:

> (a) Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

> (1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or
>
> (2) when this subchapter is made inapplicable pursuant to section 474 of title 40 or any other law, but when this subchapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.
>
> * * * * *
>
> (c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—
>
> * * * * *
>
> (10) for property or services for which it is impracticable to secure competition;
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> * * * * *
>
> (15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.
>
> * * * * *
>
> (e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings,

roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section.

Section 303 of the Act, 41 U.S.C. 253, provides:

Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided,* That all bids may be rejected when the agency head determines that it is in the public interest so to do.

Section 310 of the Act, 41 U.S.C. 260, provides:

Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this subchapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title.

STATEMENT

1. The Buy Indian Act, 25 U.S.C. 47, directs the Secretary of the Interior to employ Indian labor "[s]o far as may be practicable," and permits him to purchase "the products of Indian industry * * * in [the] open market * * *." Pursuant to the Act, the Bureau of Indian Affairs (BIA) of the Department of the Interior permits only Indian-owned firms to bid on its contracts (see App. E, *infra*, 59a-67a). BIA invited three Indian-owned construction companies to bid on a five-mile segment of road in Pushmataha County, Oklahoma, and on May 25, 1977 BIA awarded the contract to Indian Nations Construction Company, a wholly Indian-owned corporation (App. A, *infra*, 2a-3a). Respondent, a non-Indian corporation, was not afforded the right to bid for the contract (App. D, *infra*, 39a).

Respondent then instituted this action in the United States District Court for the Eastern District of Oklahoma, naming as defendants the Secretary of the Interior, the Department itself, the BIA, and the BIA contracting officer. Respondent contended that the Buy Indian Act provided no authority for the negotiation of road construction contracts, and that the government was required to advertise for bids pursuant to the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 252, 253.[1]

The district court granted summary judgment for respondent (App. D, *infra*, 34a-58a). The court concluded that the case was governed by 41 U.S.C. 252(c) and (e). Section 252(c) provides that agency purchases and contracts for property and services "shall be made by advertising, as provided in section 253," unless one of 15 enumerated exemptions is applicable. Subsection 252(e)(B) provides that Section 252 shall not be construed to authorize any contract for the construction of roads to be negotiated without advertising as required by Section 253 "unless negotiation of such contract is authorized by the provisions of paragraph (1), (2), (3), (10), (11), (12), or (14) of subsection (c)." The court rejected the contention that the Buy Indian Act exempted the Secretary from these requirements, noting that even

[1] Respondent also contended that the government had violated 41 U.S.C. 5, and had denied respondent due process. The district court held (App. D, *infra*, 39a) that 41 U.S.C. 5 was not applicable, and it declined to reach respondent's constitutional claims (App. D, *infra*, 46a-47a).

though Section 252(c)(15) provides a general exemption from the advertising requirements when "otherwise authorized by law," exemption (c)(15) was not made applicable to construction contracts under Section 252(e)(B). The court concluded that it was significant that "Congress saw fit to specifically exempt *seven subsections* of section 252(c) from the advertising requirements with respect to road construction contracts and did *not* include the 'otherwise authorized by law' provision of subsection (c)(15) within this category" (App. A, *infra*, 40a-41a; emphasis in original).

The court rejected the Secretary's administrative construction, finding that the proper construction of Section 252(c) and (e) "is not doubtful and the rule of deference by the court to an administrative interpretation has therefore no application" (App. D, *infra*, 45a-46a). The court also noted (App. D, *infra*, 46a) that the administrative interpretation was not contemporaneous with the enactment of either the Buy Indian Act or the Federal Property and Administrative Services Act.

The final judgment, entered on May 12, 1978, declared the road construction contract entered between BIA and Indian Nations null and void and permanently enjoined BIA from "circumventing the advertising requirements of 41 U.S.C. § 253 in connection with future road construction contracts" (App. D, *infra*, 58a).

2. The government appealed, and a divided panel of the court of appeals affirmed (App. A, *infra*, 1a-31a). The majority first quoted at length from the

district court's opinion (App. A, *infra*, 7a-13a). It then rejected the government's argument that the district court had erroneously treated the Federal Property and Administrative Services Act as impliedly repealing the Buy Indian Act, contrary to the teaching of *Morton* v. *Mancari*, 417 U.S. 535 (1974). The majority distinguished *Mancari* on the ground that, unlike the statute providing for a federal employment preference for Indians, which dealt with precisely the same subject matter as the later provisions prohibiting racial discrimination in federal agencies, there was nothing to suggest that the Buy Indian Act was ever intended to apply to road construction contracts (App. A, *infra*, 13a-15a). The court pointed out (App. A, *infra*, 17a) that at the time Congress enacted the Federal Property and Administrative Services Act, it was "fully cognizant of the Buy Indian Act," and was "capable of clearly and directly providing the interpretation of the Buy-Indian Act here urged by the Government." Concluding that Congress "did not elect to do so," the majority refused to " 'fill the gap' by engaging in judicial law-making" (*ibid.*).[2] Indeed, the majority commented that "[i]n our view, we are here dealing with a political question beyond the jurisdiction of the courts" (*ibid.*).

[2] In this connection, the court noted (App. A, *infra*, 17a) the government's argument that no weight should be given to the fact that the legislative history of the Buy Indian Act contained no reference to road construction, since no Indian-owned construction companies were then in existence. The court commented (*ibid.*) that, assuming the truth of that contention, there had been no showing that that argument had been made to the Congress that enacted the Federal Property and Administrative Services Act.

The court observed (App. A, *infra*, 16a-17a) that "an unambiguous statute must be given its plain and obvious meaning," and "construed as it was intended to be understood when enacted in the light of conditions as they then existed." And, it argued, when one statute speaks to a subject in general terms, and another in specific and detailed terms, the more specific act—here the provision of the Federal Property and Administrative Services Act dealing with road construction contracts—should control if there is a conflict (App. A, *infra*, 18a).

The court recognized "that the remedial Buy-Indian Act is to be given a liberal construction in order to effectuate the purpose for which it was enacted," but it concluded that "it strains the most liberal interpretation to conclude that the Act's preference for purchase of 'Indian supplies' and 'products' applies to a roadway construction project whose contract price, through Indian Construction, is $1,219,-481.00" (App. A, *infra*, 19a). Noting that the contract price was significantly higher than respondent's bid, the majority observed that "a primary, significant *remedial* feature of the advertisement and competitive bidding requirements of the Federal Property and Administrative Services Act of 1949 is to obtain the best and lowest bid for the benefit of the American taxpayers in 'high cost' construction categories" (App. A, *infra*, 19a-20a; emphasis in original). The ma-

jority concluded (App. A, *infra*, 20a) that "a statutory exception should be strictly construed so that the exception does not devour the general policy which the law embodies."

Judge McKay dissented (App. A, *infra*, 21a), arguing that the court had "reache[d] a result hostile to the remedial purposes of the Buy Indian Act" because of rigid adherence "to formalistic rules of statutory construction." Judge McKay identified "[t]he real issue in this case" as the extent to which the Buy Indian Act "retains vitality in light of the advertising requirements of the Federal Property Act" (*ibid.*). He observed (App. A, *infra*, 22a) that "[t]he Buy Indian Act announces a congressionally approved policy of preferring Indian labor and products and grants the Interior Secretary discretionary power to purchase Indian products on the open market," and that pursuant to that policy the Department of the Interior had established a road construction program that "has provided substantial economic encouragement to Indian construction enterprises." He argued that "[t]he obvious purpose of the Buy Indian Act is to encourage Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements," and that even though the legislative history of the Act "is rather scanty, it nonetheless manifests a clear purpose to except purchases of Indian products from advertising requirements" (*ibid.*). Despite the remedial purpose of the Act, the majority had found it inapplicable "because nothing in the language of the Act or in its legislative history indicates it was

intended to apply to road construction projects" (App. A, *infra*, 25a-26a). As Judge McKay pointed out, "[i]mplicit in this conclusion is the troubling notion that because a particular economic activity is not mentioned in the Act or in its legislative history, that activity is not covered. Such a construction," he contended, "may make the Act applicable to nothing at all" (App. A, *infra*, 26a; footnote omitted). In his view, the Act should not be limited to Indian economic activities that were actually being conducted in 1910, and the dissent concluded that the majority's ruling "threatens to relegate [the Buy Indian Act] to a role of protecting Indian handicraft and trinket production—economic activities that probably require no preferential treatment at all" (App. A, *infra*, 27a).

Judge McKay also argued that the majority's opinion conflicts with this Court's teaching that "statutes passed for the benefit of [Indians] are to be liberally construed, doubtful expressions being resolved in favor of Indians" (App. A, *infra*, 27a, quoting *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976)). "I simply do not understand," he wrote (App. A, *infra*, 28a; footnote omitted), "why we decline to apply the meaning of the word 'product' in a way that actually does some good." The teaching of *Morton* v. *Mancari*, he urged, required the court to "sustain both" the Buy Indian Act and the Federal Property and Administrative Services Act, "in a way that vitiates neither" (App. A, *infra*, 31a; footnote omitted).

Finally, Judge McKay argued (App. A, *infra*, 31a n.10) that in any event the injunction granted by the district court would improperly preclude the Secretary from determining, in his discretion, whether negotiation with Indian firms might still be proper pursuant to 41 U.S.C. 252(c)(10), an exemption from the federal advertising requirements where competitive bidding would be "impractical."

The government's petition for rehearing was denied on March 12, 1979; Judge McKay voted to grant rehearing (App. C, *infra*, 33a).

REASONS FOR GRANTING THE PETITION

The court of appeals' narrow reading of the Buy Indian Act is unprecedented, and wholly at odds with the remedial purpose of the statute. The decision also ignores both the legislative history and the language of the Federal Property and Administrative Services Act, each of which shows unmistakably that existing exemptions from the general federal advertising requirements—including the Buy Indian Act—were to be preserved.

Although the court of appeals' decision is one of first impression, its consequences are so serious that review by this Court is now warranted. The ruling, if permitted to stand, will effectively terminate a federal program that has provided millions of dollars of business each year to Indian-owned businesses. The Secretary informs us that, in the last year unaffected by the district court's injunction, BIA

awarded more than $11 million worth of road construction contracts to Indian-owned companies. This business provided an important source of income to Indian businesses and a significant source of employment on various reservations, substantially improving the economic base of those reservations. Many of these companies are in the Tenth Circuit, and if the court of appeals' decision becomes final the Secretary anticipates that most of those firms will be forced out of business. Moreover, the court's narrow reading of the Buy Indian Act is likely to be followed, at least in that circuit, in cases involving other kinds of BIA construction contracts that are now awarded to Indian-owned firms without public advertising. Since road construction contracts account for only a small portion of the construction contracts BIA now negotiates pursuant to its interpretation of the Buy Indian Act, the Tenth Circuit's view of the Buy Indian Act will have a serious adverse impact on a very large number of Indian businesses.

1. The inclusive language of the Buy Indian Act, 25 U.S.C. 47—which generally embraces "Indian labor" and all "products of Indian industry"—applies to the products of the Indian construction industry, as well as the products of Indian pottery, jewelry, and weaving industries. As this Court has previously recognized, a common purpose of the Buy Indian Act and other Indian preference enactments is "to further the Government's trust obligation toward the Indian tribes." *Morton* v. *Mancari*, *supra*, 417 U.S.

at 541-542 (footnote omitted). Judge McKay correctly recognized (App. A, *infra*, 22a) that the Buy Indian Act was intended to achieve this goal by "encourag[ing] Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements."

Although the legislative history of the Act is sparse, it does indicate that Congress intended both the current Buy Indian Act and its predecessor, the Act of April 30, 1908, ch. 153, 35 Stat. 71, to be broad enough to apply to construction contracts, since there were references in the debates on both acts to contracts for the construction of irrigation systems. 42 Cong. Rec. 1695 (1908) (remarks of Rep. Sherman); 45 Cong. Rec. 6097 (1910) (remarks of Rep. Burke).

In light of the remedial purpose of the Act and the settled rule that such " ' "statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed," ' " *Wilson* v. *Omaha Indian Tribe*, Nos. 78-160 & 78-161 (June 20, 1979), slip op. 10, the court of appeals erred in concluding that the Buy Indian Act can have no application to road construction contracts. Even if the brief legislative history contained no reference to any type of construction contract, that would not relieve the court of its "duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question." *United States* v. *Bornstein*, 423 U.S. 303, 310 (1976).

2. The court of appeals also erred in concluding that the advertising requirements applicable to road construction contracts under the Federal Property and Administrative Services Act, 41 U.S.C. 252(e)(B) and 253, permit no exception for contracts negotiated under the authority of the Buy Indian Act.

The Buy Indian Act was enacted as a proviso to a statute that subjected the Indian Service (BIA's predecessor) to the only advertising statute then in effect, Section 3709 of the Revised Statutes (which is currently codified as 41 U.S.C. 5). Section 23 of the Act of June 25, 1910, ch. 431, 36 Stat. 861, stated:

> That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.[3]

In 1965, when the more detailed procurement and advertising requirements of the Federal Property and Administrative Services Act were extended to executive agencies generally, including BIA, in lieu of the provision originally contained in Section 3709, Congress preserved and carried over existing exceptions to Section 3709—including the Buy Indian Act. Sec-

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[3] The portion of this section preceding the proviso, which was codified at 25 U.S.C. 93, was repealed by the Act of October 10, 1940, ch. 851, 54 Stat. 1112.

tion 5 of the Act of November 8, 1965, Pub. L. No. 89-343, 79 Stat. 1303, amended Section 310 of the Federal Property and Administrative Services Act, 41 U.S.C. 260, to provide:

> Any provision of law which authorizes an executive agency * * * to procure any property or services without advertising or without regard to said section 3709 shall be construed to authorize the procurement of such property or services pursuant to section 302(c)(15) of this Act [41 U.S.C. 252(c)(15)] without regard to the advertising requirements of sections 302(c) [41 U.S.C. 252(c)] and 303 [41 U.S.C. 253] of this Act.

The Committee Reports confirm that Congress intended to preserve "exemptions from the requirements of Revised Statutes, section 3709 * * * by constituting these as exceptions from the advertising requirements of Sections 302(c) [41 U.S.C. 252(c)] (and 303) [41 U.S.C. 253] of the act pursuant to section 302(c)(15) [41 U.S.C. 252(c)(15)]." H.R. Rep. No. 1166, 89th Cong., 1st Sess. 7-8 (1965); S. Rep. No. 274, 89th Cong., 1st Sess. 5 (1965).

The same intent was evinced in Section 1 of the Act of November 8, 1965, Pub. L. No. 89-343, 79 Stat. 1303, which amended 41 U.S.C. 252(a) to provide that the title containing the new advertising and procurement requirements did not apply where an exception was provided elsewhere:

> Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this title and implementing regulations of the Administrator; but this title does not apply—
>
> * * * * *
>
> (2) when this title is made inapplicable pursuant to * * * any other law * * *.

The Committee Reports stated that Congress intended this provision to "make[ ] clear that the limited exemptions specified * * * in any other law, are not eliminated by this section * * *." H.R. Rep. No. 1166, *supra*, at 7; S. Rep. No. 274, *supra*, at 4.

Since 41 U.S.C. 252(a) and 260 make the entire title—and particularly the advertising requirements of Section 253—inapplicable where there was a preexisting exemption, such as the Buy Indian Act, the court of appeals erred in holding that BIA is required to advertise its road construction contracts. The court's reliance on Section 252(e)(B) was misplaced. Section 252(e)(B) does not, in and of itself, state any advertising requirement. It provides only that, with certain exceptions, Section 252 shall not be construed to "permit any contract for the construction or repair of * * * roads * * * to be negotiated *without advertising as required by section 203*," that is, 41 U.S.C. 253. (Emphasis added). Since the Buy Indian Act exempts BIA from the advertising requirements of Section 253, Section 252(e)(B) stands as no obstacle to BIA's negotiation of road construction contracts pursuant to the Buy Indian Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1979

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

[Filed Jan. 11, 1979]

No. 78-1554

GLOVER CONSTRUCTION COMPANY, APPELLEE,

vs.

CECIL ANDRUS, SECRETARY OF THE DEPARTMENT OF INTERIOR; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS; and A. E. GREEN, APPELLANTS

Appeal from the United States District Court
for the Eastern District of Oklahoma

(D.C. No. 78-178-C)

Submitted: September 27, 1978

Before McWILLIAMS, BARRETT and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

The United States, by and through Cecil Andrus, Secretary of the Department of the Interior, et al., (Government) appeals from a summary judgment entered on behalf of Glover Construction Company (Glover), a non-Indian owned contracting company, setting aside and rendering null and void a road construction contract awarded by the Government, through the Bureau of Indian Affairs (BIA), to Indian Nations Construction Company (Indian Construction), an Indian owned company. The contract was let for the reconstruction of five miles of roadway in Pushmataha County, Oklahoma.

The facts are not in dispute. In March of 1976, Government, through the Commissioner of the BIA, issued a memorandum designated as 20 BIAM Bulletin 1 interpretive of the Buy-Indian Act, 25 U.S.C.A. § 47.[1] The memo provides that bidding on contracts with the BIA is restricted or confined to Indian owned companies. Non-Indian owned companies are permitted to bid only if Indian owned companies are not available to bid or do not bid. Prior to May 25, 1977, the BIA invited three Indian owned construction companies to submit bids on a contract for reconstruction of five miles of existing

[1] 25 U.S.C.A. § 47 provides:

Employment of Indian labor and purchase of products of Indian industry

So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. Apr. 30, 1908, c. 153, 35 Stat. 71; June 25, 1910, c. 431, § 23, 36 Stat. 861.

roadway as provided by 41 CFR § 1-3.215(a) pursuant to the Buy-Indian Act, *supra*. The contract was awarded on May 25, 1977, to Indian Construction, whose bid was $1,219,481.00. No attempt was made by the Government to publicly advertise for bids pursuant to 41 U.S.C.A. § 253,[2] popularly known as the Federal Property and Administrative Services Act of 1949, in relation to its application to the relevant provisions of 41 U.S.C.A. § 252.[3] No conten-

[2] 41 U.S.C.A. § 253 provides:

Advertising requirements

Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned . . .

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest to do so. June 30, 1949, c. 288, Title III, § 303, 63 Stat. 395; July 12, 1952, c. 703, § 1(m), 66 Stat. 594.

[3] 41 U.S.C.A. § 252 provides:

* * * *

Negotiated purchases and contract for property; conditions

(c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and

tions are advanced by Government that the contract here involved was subject to negotiation under the exceptions of paragraphs (1), (3), (10), (12) or (14) of subsection (c) of § 252, *supra.*

Glover contends that the Government violated 41 U.S.C.A. § 5 which provides that purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved does not exceed $2,500.00, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government officer shall so certify, or (4) when

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contracts may be negotiated by the agency head without advertising if—

(10) for property or services for which it is impractical to secure competition.

(15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.

Exceptions to this section

(e) This section shall not be construed to: (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) *permit any contract for the construction or repair of* buildings, *roads* sidewalks, sewers, mains, or similar items *to be negotiated without advertising as required by Section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-(12), or (14) of subsection (c) of this title.*" (Emphasis supplied.)

the services are required to be performed by the contractor in person and are of a technical or professional nature or under Government supervision and paid for on a time basis. 41 U.S.C.A. § 5 was originally enacted in 1946. 60 Stat. 809.

Further, Glover contends that the Government was required to publicly advertise for bids pursuant to 41 U.S.C.A. § 253, *supra,* and that the BIA's contracting procedure giving preference to Indians violated Glover's rights to equal protection and due process of law. The Government contends that the contracting procedure is authorized by the Buy-Indian Act, *supra,* and that it is constitutional.

The District Court did not reach the constitutional contentions. The Court did conclude, however, that under the terms of the Federal Property Act, 41 U.S.C.A. § 252, the Buy-Indian Act, 25 U.S.C.A. § 47, could not be applied to road construction contracts; that the contract awarded Indian Construction was null and void; and that the Government (Interior-BIA) should be enjoined from entering into any future road construction contracts without complying with the public advertising requirements.

On appeal, Government contends that the District Court erred in finding and concluding that the BIA (Government) may not enter into road construction contracts with Indian owned contracting companies without publicly advertising for bids pursuant to 41 U.S.C.A. § 253.

The District Court saw the issues framed as follows: In 1976 the BIA implemented its "new" in-

terpretation of the "Buy-Indian Act," *supra*, (which Act had been in effect since 1910) under which the BIA entered into contractual negotiations with wholly owned Indian companies for road construction projects without complying with the advertising requirements of 41 U.S.C.A. §§ 5 and 253; under the "new" interpretation, bids are to be taken only among Indian owned contracting companies and non-Indian contractors are to be contacted and considered for road construction projects only after it has been determined that there are no qualified Indian contractors within the normal competitive area; Government claims that the "new" policy interpretive of the Buy-Indian Act falls within the "otherwise authorized by law" exception to advertising provided by 41 U.S.C.A. § 253(c)(15);[4] Glover contends that 41 U.S.C.A. § 252(e) fails to exempt contracts for the construction of roads from the advertising requirements, since it expressly exempts 41 U.S.C.A. § 252(c)(1)-(3), (10)-(12), and (14) but does not refer to subsection (15); the parties agree that 41 U.S.C.A. §§ 252 and 253 apply to the BIA.

The District Court ruled that the procedure followed by the BIA in awarding the road construction contract to Indian Construction contravenes the requirements of 41 U.S.C.A. §§ 252 and 253. We agree.

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[4] Even though the parties have not referred to the provisions of § 254, *supra*, we observe that Congress has restricted the availability of the "otherwise authorized by law" exception to § 252(c). We do not here decide the applicability of this section to the disposition of the instant case.

The District Court's order is, in our view, worthy of quotation in pertinent part, to-wit:

> Section 252(c) makes all purchases and contracts for property and services *subject to the advertising requirements* of section 253 *unless* they come within any of the fifteen enumerated exceptions. Defendants contend that the Buy Indian Act comes within subsection (15). There is no contention that any of the other fourteen exceptions apply in this case. Subsection (e)(B) specifically provides that section 252 shall *not* be construed to permit any contract for the construction of roads to be negotiated *without advertising* as required by section 253 unless the contract is to be performed outside the continental United States or *unless* negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-(12), or (14) of subsection (c).
>
> Defendants' argument that subsection (e) is an admonition rather than a prohibition and that subsection (c)(15) authorizes negotiation of road construction contracts under the Buy Indian Act is unpersuasive. Congress saw fit to specifically exempt *seven subsections* of section 252(c) from the advertising requirements with respect to road construction contracts and did *not* include the "otherwise authorized by law" provision of subsection (c)(15) within this category. This is the subsection on which defendants rely.
>
> The effect of the enumeration of express exceptions in a statute has been stated as follows:
>
> The specification by the legislature of ex-

ceptions to the operation of a general statute, does not necessarily operate to preclude the court from applying other exceptions. However, where express exceptions are made, the legal presumption is that the legislature *did not intend to save other cases from the operation of the statute.* Thus, the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made. Under this principle, where a general rule has been established by a statute with exceptions, the courts will not curtail the former, nor add to the latter, by implication. (Emphasis added.)

73 Am.Jur.2d *Statutes* § 316 (1974) (footnotes omitted). The court accordingly concludes that contracts for the construction of roads, such as the contract involved in the instant action, are *not* excepted from the advertising requirements of section 253 by virtue of section 252(c)(15).

Defendants contend, however, that the Buy Indian Act has been interpreted for many years as authorizing construction contracting with invitations to bid restricted to Indian contractors, and that this administrative construction of the statute is entitled to great weight. Plaintiff contends that 20 BIAM Bulletin 1 of March 3, 1976 (Exhibit D to defendants' brief) represents a new policy, and even if not new, that the statutory interpretation therein espoused is entitled to little or no weight since it is not a contemporaneous statutory construction.

Defendants' exhibits establish at best that the interpretation set forth in the 1976 bulletin may date back as far as 1961. Assuming this to be true for the purpose of plaintiff's summary judgment motion it does not follow that such interpretation is entitled to be given great weight, or any weight, upon the question of the proper statutory interpretation.

Defendants rely on *Udall* v. *Tallman*, 380 U.S. 1 (1965), and *United States* v. *Jackson*, 280 U.S. 183 (1930) for the general rule of statutory construction that "great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration." 280 U.S. at 193. The Court emphasized in *Udall*, however, that the Secretary had consistently construed the executive order and public land order there involved since their promulgation and that this interpretation had been made a repeated matter of public record. 380 U.S. at 4, 17. Furthermore, the Supreme Court has recognized that

> [i]t has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such construction will not be disturbed except for cogent reasons. See e.g. *Logan* v. *Davis*, 233 U.S. 613, 627. But the court is not bound by a construction so established. *Chicago &c. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U.S. 97, 99. *United States* v. *Dickson*, 15 Pet. 141, 161. *The rule does not apply in cases where the construction is not doubtful.* And if such interpretation has not been uni-

> form, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons. *Brown* v. *United States*, 113 U.S. 568, 571. *Merritt* v. *Cameron*, 137 U.S. 542, 551-552. *United States* v. *Alabama Railroad Co.*, 142 U.S. 615, 621. *United States* v. *Healey*, 160 U.S. 136, 145. *Studebaker* v. *Perry*, 184 U.S. 258, 268. *Houghton* v. *Payne*, 194 U.S. 88, 99.

United States v. *Missouri Pacific R.R.*, 278 U.S. 269, 280 (1929) (emphasis added). The Court has also said:

> True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U.S. 760, 763; *Logan* v. *Davis*, 233 U.S. 613, 627; *Brewster* v. *Gage*, 280 U.S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375; *Interstate Commerce Commn.* v. *N.Y., N.H. & H.R. Co.*, 287 U.S. 178. The practice has peculiar weight when it involves a *contemporaneous* construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. *Fawcus Machine Co.* v. *United States, supra.* (Emphasis added.)

Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294, 315 (1933). And, the Supreme Court further stated in *Missouri Pacific*:

> The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. *It is elementary that where no ambiguity exists there is no room for construction.* Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation . . . . Construction may not be substituted for legislation. *United States* v. *Wiltberger*, 5 Wheat, 76, 95-96. *United States* v. *Fisher*, 2 Cranch 358, 386. *Lake County* v. *Rollins*, 130 U.S. 662, 670. *Caminetti* v. *United States*, 242 U.S. 470. *Ex parte Public National Bank, ante*, p. 101. *United States* v. *Colorado & N.W.R. Co.*, 157 Fed. 321, 327.
>
> . . . Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or

> impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. *United States* v. *Freight Ass'n*, 166 U.S. 290, 325. *Pennsylvania R.R.* v. *International Coal Co.*, 230 U.S. 184, 199. *Mackenzie* v. *Hare*, 239 U.S. 299, 308. *Caminetti* v. *United States*, *supra*, 490.

278 U.S. at 277-78 (emphasis added).

The court is of the view that construction of section 252(c) & (e) is not doubtful and that the rule of deference by the court to an administrative interpretation has therefore no application in this case. Moreover, even if the rule were applicable, defendants have not shown or even contended that the policy challenged in this action has been in effect prior to 1961. The Buy Indian Act has been in effect since 1910 and 41 U.S.C. §§ 252 and 253 have been in effect since 1949. There is accordingly no contemporaneous interpretation involved in this case. It was held in *United States* v. *Manzi*, 16 F.2d 884 (1st Cir. 1926) that a construction not adopted by the department until after a statute had been in operation for fourteen years was entitled to little or no weight upon the question of the proper interpretation of the statute. *See also Citizen Band of Potawatomie Indians of Oklahoma* v. *United States*, 391 F.2d 614, 621 (Ct. Cl. 1967), *cert. denied*, 389 U.S. 1046 (1968).

> For all of the foregoing reasons and on the basis of the authorities heretofore discussed the court concludes that defendants' procedure in connection with awarding the road construction contract involved in this case contravenes the advertising requirements of 41 U.S.C. §§ 252 & 253. Summary judgment is accordingly granted in favor of the plaintiff and against the defendants. Defendants' cross-motion for summary judgment is denied.
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> [R., Vol. I, pp. 30-33.]

Government's main thrust is that the subject contract does fall within the enumerated exceptions to the advertising requirement, and that, in any event, the list of exceptions contained in 41 U.S.C.A. § 252 (e) was not intended to preclude dispensing with the advertising requirements where independent statutory authority (the Buy-Indian Act) exists. Inasmuch as the Buy-Indian Act is not mentioned or referred to in the Federal Property Act, the Government argues that ". . . the district court must necessarily have concluded that Section 302(e) of the Federal Property Act, 41 U.S.C. 252(e), repealed the Buy-Indian Act in regard to construction and repair contracts only by implication." [Brief of Appellant, p. 8.] This argument, in our view, "misses the mark." The District Court made no reference to the rule relating to repeal by implication of law. The rule does not come into play here simply because, contrary to the Government's claim, *nothing* in the Buy-Indian Act speaks to or directly mentions roadway construction projects. The Government thus

would have us construe the language in the Buy-Indian Act directing purchase of "Indian supplies" and "products" on the "open market" as directly and unequivocally relating to a contract covering a roadway construction project. In pressing the point, the Government relies on Bryan v. Itasca County, 426 U.S. 373 (1976) and Morton v. Mancari, 417 U.S. 535 (1974) for the rule that statutes passed for the benefit of dependent Indian tribes are to be liberally construed and doubtful expressions resolved in favor of the Indians. The *Morton* case involved the issue whether a provision allowing an employment preference to Indians under the Indian Reorganization Act of 1934 was impliedly repealed by Section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C.A. § 2000e-16(a), which provides that all personnel actions affecting employment in most federal agencies must be made free from discrimination based on race, color, religion, sex or national origin. The Supreme Court held that the latter act did not repeal the former by implication because—and this is critical—the Indian Reorganization Act of 1934 was of a longstanding preference and an important component of the Government's Indian policy. Thus, the Court refused to hold that the provisions of the EEOC Act of 1972 repealed by implication of law the preference provisions of the Indian Reorganization Act. Significantly, the Supreme Court observed that this could come to pass only if the two statutes are *entirely irreconcilable*. Such was not the case in Morton v. Mancari, *supra*. The hiring pref-

erences provided for under the Indian Reorganization Act of 1934 exempted Indians from the Civil Service laws and thus the Act spoke directly to the *same subject matter* as that addressed in the EEOC Act, i.e., employment by federal agencies. It would, in our view, require a considerable "stretch of the imagination" to conclude that the Congress intended the Buy-Indian Act to apply to road construction projects. It is clear, *on its face*, however, that the Congress did intend that 41 U.S.C.A. §§ 252 and 253 apply to road construction projects.

We agree with Glover's analysis of the "faulty premises" upon which the Government predicates its argument that the contract awarded to Indian Construction was authorized by subsection 15 of Section 252, *supra*:

> . . . *First*, the proposition must be accepted that 25 U.S.C., Sec. 47 embraces roadway construction contracts, which it doesn't. *Second*, the proposition must be accepted that the language of the statute which states, "this section shall not be construed . . . to permit any contract for the construction or repair of . . . roads . . . to be negotiated without advertising as required by section 253 of this title . . .", really just doesn't mean what it says, and apparently, just dosen't mean anything at all. *Third*, the proposition must be accepted that the proviso within the exception which specifically excludes paragraph (1)-(3), (10)-(12), or (14) or 252(c), but *omits* to exclude paragraph (15) is likewise without significance and can be disregarded.
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> **[Brief of Appellee, p. 11]**

There is nothing in the language of the Buy-Indian Act or its legislative history which suggests that it was intended to apply to roadway construction projects. As if anticipating the "roadblock" created thereby, the Government attempts to gain a legal "foothold" by relating that the solicitor of the Department of the Interior rendered an opinion on April 27, 1971, entitled "Negotiability of Construction Contracts under the 'Buy-Indian' Act of June 25, 1910" which confirmed the administrative interpretation of the Act going back to about 1961. This opinion concluded that the enumerated exceptions in 41 U.S.C.A. § 252(c) and (e) were not intended to preclude dispensing with public advertising under the authority of the Buy-Indian Act. The Government states that the District Court failed to give any deference to the Department of the Interior's "long-standing" construction of the Buy-Indian Act. Our response is that if the Government's administrative interpretation is entitled to the deference urged, the Congress is the branch before whom the point should be pressed. We have heretofore stated that this Court shall not, under its classical adjudicative power, undertake to legislate. In conjunction therewith, we have held that statutes are to be construed in a manner so as to effectuate the intent of the enacting body, and that an unambiguous statute must be given its plain and obvious meaning. United States v. Ray, 488 F.2d 15 (10th Cir. 1973); United States v. Western Pacific Railroad Company, 385 F.2d 161 (10th Cir. 1967), *cert. denied*, 391 U.S. 919 (1968).

When the Congress was dealing with the Federal Property and Administrative Services Act of 1949, 41 U.S.C.A. §§ 252 and 253, it was deemed to be fully cognizant of the Buy-Indian Act of 1910. The Congress was, accordingly, capable of clearly and directly providing the interpretation of the Buy-Indian Act here urged by the Government. The fact is that it did not elect to do so. This Court cannot "fill the gap" by engaging in judicial law-making. Chavez v. Freshpict Foods, Inc., 456 F.2d 890 (10th Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972); McCord v. Dixie Aviation Corporation, 450 F.2d 1129 (10th Cir. 1971). In our view, we are here dealing with a political question beyond the judisdiction of the courts. Baker v. Carr, 369 U.S. 186 (1962).

A statute must be construed as it was intended to be understood when enacted in the light of conditions as they then existed. United States v. Stewart, 311 U.S. 60 (1940). Assuming, *arguendo*, the truth of the Government's contention that there were no Indian owned companies engaging in roadway construction in 1910 when the Buy-Indian Act was passed, still we observe that this contention is not advanced in relation to 1949 when the Federal Property Act was passed. In any event, we do not place particular weight on this matter.

Words of a statute are to be interpreted in their ordinary definitions and in the meanings commonly attributed to them. Jones v. Liberty Glass Company, 332 U.S. 524 (1947). Even where there are two statutes on the same subject, the earlier being *special*

and the later being *general* the special act controls as effective and all matters coming within the scope of the special statute are governed by its provisions. Preiser v. Rodriguez, 411 U.S. 475 (1973); Missouri K & T Ry. Co. v. Jackson, 174 F.2d 297 (10th Cir. 1949); Sutherland, Statutory Construction, 4th Ed., Vol. 2A, § 51.05. In Sutherland, *supra*, the rule is stated:

> General and special acts may be in pari materia. If so, they should be construed together. Where one statute deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible; but if there is any conflict, the latter will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling. In the language of a court: "It is the general rule that where the general statute standing alone would include the same matter as the specific act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. Where the special statute is later it will be regarded as an exception to or qualification of the prior general one; and where the general act is later the special statute will be considered as remaining an exception to its terms unless it is repealed in general words or by necessary implication." (Footnotes omitted.)

Government vigorously contends that its interpretive preference, which led to the grant of the non-

competitive award of the roadway construction project to Indian Construction is based upon the *remedial* aspects of the Buy-Indian Act, to-wit: Furtherance of a ". . . longstanding and important component of the Government's Indian policy designed to enable Indians to obtain jobs without having to compete on equal terms with non-Indians." [Brief of Appellants, p. 9.] We recognize that the remedial Buy-Indian Act is to be given a liberal construction in order to effectuate the purpose for which it was enacted. Sutherland, Statutory Construction, 4th Ed., Vol. 3, § 60.01. Even so, we believe that it strains the most liberal interpretation to conclude that the Act's preference for purchase of "Indian supplies" and "products" applies to a roadway reconstruction project whose contract price, through Indian Construction, is $1,219,481.00. The strain is the more "painful" when we consider that the Government engineer's estimate for the project was $963,117.48 and that Glover completed the first five miles of the reconstruction project, under normal competitive bidding procedures, for $538,000.00. While we do not represent or pretend that these comparative figures control in determining the reasonableness of the Indian Construction non-competitive contract price of $1,219,481.00, we do observe that a primary, significant *remedial* feature of the advertisement and competitive bidding requirements of the Federal Property and Administrative Services Act of 1949 is to obtain the best and lowest bid for the benefit of the American taxpayers in "high cost" construction

categories. In that sense we observe that this Court has held that a statutory exception should be strictly construed so that the exception does not devour the general policy which the law embodies. Edward B. Marks Music Corp. v. Colorado Mag., Inc., 497 F.2d 285 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975).

WE AFFIRM.

McKAY, Circuit Judge, dissenting:

By rigidly adhering to formalistic rules of statutory construction, today's opinion reaches a result hostile to the remedial purposes of the Buy Indian Act. Inasmuch as the relevant rules of statutory construction could be applied in a reasonable manner to reach a result more in keeping with national policy priorities, I am compelled to dissent.[1]

The real issue in this case is the extent to which the Buy Indian Act, 25 U.S.C. § 47 (1976), retains vitality in light of the advertising requirements of the Federal Property Act, 41 U.S.C. §§ 252, 253 (1976). In order to understand the tension between the provisions, it will be helpful to consider the purposes, history and applications of the Buy Indian Act.

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[1] In addition to dissenting from the majority's decision on the merits, I take exception to the statement that this case involves a political question over which we have no jurisdiction. The "political question" doctrine holds as nonjusticiable under the separation of powers concept cases involving matters which have been committed by the Constitution to another branch of government. Baker v. Carr, 369 U.S. 186, 210 (1962). These cases typically involve such matters as foreign relations, procedures for ratifying constitutional amendments, and the republican form of government guaranty. 369 U.S. at 211, 214, 218. The suggestion that the instant case involves a political question would appear to be novel. It certainly is not supported by *Baker* v. *Carr*, cited by the majority, in which the Supreme Court found the issue under consideration there not to be a political question. In any event, to the extent this case is said to involve a *policy* question, it is sufficient to observe that Congress has already decided it in favor of Indians by enacting the Buy Indian Act.

The Buy Indian Act announces a congressionally approved policy of preferring Indian labor and products and grants the Interior Secretary discretionary power to purchase Indian products in the open market. Pursuant to this authority, the Secretary has authorized the negotiation of contracts with Indians to the exclusion of non-Indians. 41 C.F.R. § 14H-3.215.70 (1977). One result has been the development of a program under which the Interior Department has awarded millions of dollars in road construction contracts to Indian contractors. This program has provided substantial economic encouragement to Indian construction enterprises. The program is emasculated by today's opinion.

The obvious purpose of the Buy Indian Act is to encourage Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements. Its laudable goal is furthering the economic progress of a disadvantaged people. While the legislative history of the Buy Indian Act is rather scanty, it nonetheless manifests a clear purpose to except purchases of Indian products from advertising requirements. In 1910 changes were made in the legislation containing the earliest version of the language now preserved in the Act. Some of the legislative commentary on the proposed changes demonstrates the purpose of the Buy Indian Act itself.

In relevant part, the language of the 1910 proposed amendment reads as follows:

> That hereafter the purchase of Indian supplies shall be made in conformity with the [advertising] requirements of section 3709 of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed and purchases of the products of Indian industry may be made in open market, in the discretion of the Secretary of the Interior. All acts and parts of acts in conflict with the provisions of this section are hereby repealed.

H.R. 24992, 61st Cong., 2d Sess. § 28 (1910), 45 Cong. Rec. 6097 (1910). This section of the bill was virtually identical to the version ultimately enacted. Act of June 25, 1910, Pub. L. No. 313, § 23, 36 Stat. 861 (1910).

Prior to the passage of the amendment, the House Committee on Indian Affairs commented on its purpose and compared it to the version being amended:

> The purpose of this section is patent from the text. If this section shall be enacted into law it will repeal the following portion of the act of April 30, 1908 (35 Stat., 71):
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> > [Indian appropriation act, April 30, 1908 (35 Stat., 71).]
> >
> > That no purchase of supplies for which appropriations are herein or hereinafter made for the Indian service, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in case of exigency, when, in the discretion of the Secretary of

the Interior, who shall make official record of the facts constituting the exigency, and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars at any one purchase: *Provided*, That hereafter supplies may be purchased, contracts let, and labor employed for the construction of artesian wells, ditches, and other works for irrigation, not to exceed the sum of five thousand dollars in any one purchase or contract, in the discretion of the Secretary of the Interior, without advertising as hereinbefore provided: *Provided further*, That as far as practicable Indian labor shall be employed and purchase in the open market made from Indians, under the direction of the Secretary of the Interior.

With the exceptions noted in the proviso, it will bring the Indian Service, like all other branches of the public service, under the provisions of section 3709 of the Revised Statutes of the United States, which reads as follows:

> [Section 3709, Revised Statute.]
>
> Sec. 3709. All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the place and in the manner in which such articles are usually bought and sold, or such services engaged between individuals.

H. R. Rep. No. 1135, 61st Cong., 2d Sess. 12 (1910) (bracketed material in original). The "exceptions noted in the proviso" constituted the substance of the Buy Indian Act as it now appears. The significance of the proviso is apparent: It excepted Indian products from the strictures of the advertising statute then in effect.[2]

The perpetuation of the proviso's language into the present era indicates that the purpose is still of significance. In light of the Act's legislative history and for the policy reasons underlying the Act itself, purchases of Indian products should be governed by that Act and should not be subject to standard advertising requirements not made explicitly applicable to otherwise exempted Indian products.

Despite the message of the legislative history, and despite the remedial purposes of the Act, the majority concludes that the Interior Department's road con-

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[2] In this regard, it is noteworthy that this particular amendment was motivated, at least in part, by an intention to prevent abuses in the purchase of supplies for Indians. It seems that many purchases had been accomplished by skirting the advertising requirements then in effect. While the amendment sought to strengthen generally the advertising requirement, an exception was expressly included for purchases of Indian products. 45 Cong. Rec. 6097 (1910) (remarks of Rep. Burke).

struction program is illegal. It makes this conclusion by determining that there is no conflict between the Buy Indian Act and the Federal Property Act's advertising requirements. This determination depends, in turn, on the majority's view that because nothing in the language of the Act or in its legislative history indicates it was intended to apply to road construction projects, the term "products of Indian industry" does not include Indian built roads. Implicit in this conclusion is the troubling notion that because a particular economic activity is not mentioned in the Act or in its legislative history, that activity is not covered. Such a construction may make the Act applicable to nothing at all.[3]

Alternatively, the majority may be suggesting that only those Indian activities conducted in 1910 are covered by the Act.[4] The record does not inform us whether Indian road construction enterprises existed in that year.[5] Regardless of this latter fact, the

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[3] Congress often casts "statutory provisions in general terms, leaving to the agency the task of spelling out the specific regulations and programs." Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 703 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974).

[4] The opinion contends that the Interior Department's longstanding interpretation of the Act is not persuasive because that interpretation was not articulated in 1910.

[5] Legislative history does indicate that Indians participated in reservation road construction projects during this period. *See* Letter from James Rudolph Garfield, Secretary of the Interior, to Senator Moses E. Clapp (Feb. 19, 1908), *reprinted in* S. Rep. No. 278, 60th Cong., 1st Sess. 18-19 (1908).

thrust of this rationale would have the effect of restricting the Act's application to activities of a 1910 vintage—which is hardly a reasonable way to encourage significant economic development in a modern market context.[6] There is no indication Congress intended the preferential treatment to be limited to economic activities Indians were involved in at the time of enactment. Indeed, the Act's very purpose is to encourage Indian economic enterprises that would suffer in a competitive context. The view of the Act expressed in today's opinion threatens to relegate it to a role of protecting Indian handicraft and trinket production—economic activities that probably require no preferential treatment at all.

Today's opinion ignores the Supreme Court's clear instructions on statutory construction where Indians are involved. Writing for a unanimous Court in *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), Mr. Justice Brennan characterized as an "eminently sound and vital canon" the proposition that "statutes passed for the benefit of [Indians] are to be liberally construed, doubtful expressions being resolved in favor of the Indians." 426 U.S. at 392. It seems to me that we have done just the opposite in this case. I am perplexed by the court's unwillingness to apply

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[6] The majority's concern about noncontemporaneous interpretations of the Act fails to consider the often unavoidable generality of statutory language. See note 3, *supra*. It also begs the more pertinent question whether the Act as passed in 1910 gave he Secretary authority to negotiate contracts for all varieties of Indian products—beads or roads. I believe the Act could have no other reasonable meaning.

the label "product of Indian industry" to highways produced by Indian companies. I am certain the majority would have had little difficulty determining that Indian blankets and beads are products of Indian industry. Indeed, counsel for Glover Construction admitted in oral argument that a multimillion dollar computer would be an Indian product if it were manufactured by an Indian company. I fail to see why an Indian built road is not an Indian product. I simply do not understand why we decline to apply the meaning of the word "product" in a way that actually does some good.[7]

My view of the Buy Indian Act does result in apparent conflict between it and the advertising requirements of the Federal Property Act. If this conflict is to result in a resolution that applies the advertising provisions to Indian roadway construction contracts, then to this extent the Buy Indian Act will have been repealed by implication. It seems to me that a much more sensible outcome could be obtained. An example of such an outcome appears

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[7] In Great Western Broadcasting Corp. v. N.L.R.B., 310 F.2d 591, 595 (9th Cir. 1962), the following definition of "product" was given: "In its broadest sense, the term 'product' denotes anything which is produced. Since economic activity includes the rendition of services, it is appropriate, where the context otherwise permits, to refer to a completed service as a 'product.'" The context of the instant statutory provision permits a broad definition to be employed. If pure services are thought to be includable within the definition, so ought to be activities such as road building which, though labor intensive, result in a tangible product.

in the Supreme Court's opinion in *Morton* v. *Mancari*, 417 U.S. 535 (1974).

The *Morton* v. *Mancari* case presented the question whether the Indian employment preference provision of the Indian Reorganization Act, 25 U.S.C. § 472, was impliedly repealed by Section 11 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16(a). This section of the Employment Act requires federal agencies to make personnel actions without regard to race, color, religion, sex or national origin. Thus a conflict was presented between the Indian Reorganization Act's preferential mandate and the Employment Act's proscriptions against discrimination. After examining the history and purpose of Indian preference statutes (including the one under consideration here), the Court said that in the absence of an affirmative showing of an intention to repeal, the only justification for a repeal by implication is that the statutes are irreconcilable. The Court found that the statutes were not. It concluded that a provision aimed at furthering Indian self-government by granting employment preference to Indians for positions in the Bureau of Indian Affairs can readily co-exist with a general proscription against employment discrimination. "Any other conclusion," said the Court, "can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians." 417 U.S. at 550. The Court went on to observe that the preference statute applied to a very specific situation, while the Employment Act

provision applied to Federal employment generally. In upholding the preference statute, the Court noted that a specific statute will not be controlled by a more general one.

Essentially the same considerations apply to the case before this Court. Once again, an Indian preference statute is involved.[8] Neither the language nor the legislative history of the Federal Property Act indicates an intent to repeal or modify the Buy Indian Act. The Act applies in limited circumstances only; the relevant Federal Property Act provisions apply to general Federal procurement of construction contracts.[9] Like the employment preference in *Mancari*, the Buy Indian Act arises from the unique legal relationship between Indians and the Federal Government. As the *Mancari* preference was designed to promote Indian self-government, the preference here is designed to promote Indian economic development and self-sufficiency. And, as the preference statute in *Mancari* could co-exist with a general policy of non-discrimination in government employment, the Buy Indian Act's authorization of the negotiation of road construction contracts with Indian firms can co-exist with a broad rule requiring public advertising for bids on Government construction contracts.

[8] The *Mancari* Court listed the Buy Indian Act among the preference statutes similar to the one under consideration in that case. 417 U.S. at 538 n.2, 541 n.8.

[9] The majority's argument about specific statutory provisions controlling general ones is, in this sense, supportive of a result opposite to that reached in its opinion.

This result is consistent with the following admonition from *Mancari*:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

417 U.S. at 551. Given the Supreme Court's admonition, our decision in this case should be to sustain both statutory provisions in a way that vitiates neither.[10]

I would reverse.

[10] Even if the majority's general perception of the dominance of the advertising provisions were correct, there would still be a problem with the remedy in this case. An injunction has been upheld, and upheld in the face of substantial work on the construction project. It seems to me that this remedy prevents the Secretary from exercising his discretion in a way that might still except this contract from the advertising requirements. The policy of the Buy Indian Act is to encourage Indian economic development by shielding Indian economic enterprises from the full rigors of market pressure. It is obvious that this policy purpose would be frustrated by an imposition of market pressures in the form of advertised bidding. In light of the purpose of the Buy Indian Act, advertised bidding with its inherent competitiveness may be within the "impracticability" exception to the advertising requirements of 41 U.S.C. § 252(c), (e) (1976). *See* Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 708 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974) (holding competition "impractical" where as cross-purposes with the Small Business Act). At the very least, this case should be remanded with instructions allowing the Secretary to determine whether that exception applies. I believe the exception might well apply as a matter of law.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER TERM—January 11, 1979

Before Honorable Robert H. McWilliams, Honorable James E. Barrett and Honorable Monroe G. McKay, Circuit Judges.

GLOVER CONSTRUCTION COMPANY,
PLAINTIFF-APPELLEE,

vs.

CECIL ANDRUS, SECRETARY OF THE DEPARTMENT OF INTERIOR; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, and A. E. GREEN, DEFENDANT-APPELLANTS.

JUDGMENT

No. 78-1554

(D.C. No. 78-178-C)

This cause came on to be heard on the record on appeal from the United States Court for the Eastern District of Oklahoma, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. Judge McKay, Circuit Judge, dissents.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk

APPENDIX C

MARCH TERM—March 12, 1979

Before Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Circuit Judges.

No. 78-1554

GLOVER CONSTRUCTION COMPANY,
PLAINTIFF-APPELLEE,

vs.

CECIL ANDRUS, SECRETARY OF THE DEPARTMENT OF INTERIOR; DEPARTMENT OF INTERIOR; BUREAU OF INDIAN AFFAIRS, and A. E. GREEN, DEFENDANT-APPELLANTS.

This matter comes on for consideration of appellants' motion for leave to file petition for rehearing out of time and the appellants' petition for rehearing.

Upon consideration whereof, it is ordered as follows:

1. Appellants' petition for rehearing is ordered filed as of March 2, 1979.

2. The petition for rehearing is denied on the merits. Judge McKay voted to grant rehearing.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS,
Clerk

APPENDIX D

GLOVER CONSTRUCTION COMANY, PLAINTIFF,

v.

CECIL ANDRUS, SECRETARY OF THE DEPARTMENT OF INTERIOR, *et al.*, DEFENDANTS.

No. 77-178-C

UNITED STATES DISTRICT COURT,
E. D. OKLAHOMA

March 29, 1978

On Motion for Clarification May 12, 1978

ORDER GRANTING SUMMARY JUDGMENT

MORRIS, Chief Judge.

This action is before the court on motions for summary judgment filed by the plainitff and the defendants. The parties have filed briefs setting forth their respective positions in connection with these motions.

Plaintiff contends that it is entitled to summary judgment on its claim that the policy of the Bureau of Indian Affairs (BIA) of entering into contractual negotiations with wholly Indian owned companies regarding road construction without complying with the advertising requirements of 41 U.S.C. § 5 and 41 U.S.C. § 253 denies plaintiff equal protection of the laws and due process of law. In this connection plaintiff asserts that the BIA, in 1976 began implementing

a new interpretation of the "Buy Indian Act," 25 U.S.C. § 47, which act has been in effect since 1910. Plaintiff points to an interdepartmental memorandum, 20 BIAM Bulletin 1, March 3, 1976 (Exhibit D to defendants' brief) providing that negotiations are to be conducted with Indian contractors and that non-Indian contractors are to be contacted only after it has been determined that there are no qualified Indian contractors within the normal competitive area. Plaintiff contends that the Buy Indian Act does not authorize contract negotations for the construction of roads and that such a procurement must be obtained in accordance with the requirements set out in 41 U.S.C. §§ 5 and 253.

Defendants claim that they have consistently followed the policy set out in the bulletin and that the Buy Indian Act falls within the "otherwise authorized by law" exception to advertising under 41 U.S.C. § 252(c)(15). *See* Exhibit J to defendants' brief. In response to the latter contention plaintiff states that 41 U.S.C. § 252(e) fails to exempt contracts for the construction of roads from the advertising requirements, since it expressly exempts 41 U.S.C. § 252(c)(1)-(3), (10)-(12), and (14) but does not refer to subsection (15). Thus, plaintiff argues, subsection (15) is not excluded from the provisions of 41 U.S.C. § 253 under the maxim "expressio unius est exclusio alterius."

25 U.S.C. § 47 provides:

> So far as may be practicable Indian labor shall be employed, and purchases of the products

of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

Section 47 was codified from the Act of June 25, 1910, ch. 431, § 23, 36 Stat. 861 which provides in its entirety as follows:

> That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed.

Since title 25 of the United States Code is not among the titles of the United States Code which have been enacted into law, *see* Preface to 1976 Edition of the United States Code, reference to the Statutes at Large is proper. Section 3709 of the Revised Statutes has been codified as 41 U.S.C. § 5.

41 U.S.C. § 252 provides in pertinent part:

> (a) Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this chapter and implementing regulations of the Administrator; but this chapter does not apply—
>
> (1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or
>
> (2) when this chapter is made inapplicable pursuant to section 474 of Title 40 or any other

> law, but when this chapter is made inapplicable by any such provision of law sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5.
>
> . . . .
>
> (c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—
>
> . . . .
>
> (15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.
>
> . . . .
>
> (e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-(12), or (14) of subsection (c) of this section.

41 U.S.C. § 253(a) provides:

> Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

41 U.S.C. § 5 provides:

Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $10,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. Except (1) as authorized by section 1638 of Appendix to Title 50, (2) when otherwise authorized by law, or (3) when the reasonable value involved in any one case does not exceed $500, sales and contracts of sale by the Government shall be governed by the requirements of this section for advertising.

In the case of wholly owned Government corporations, this section shall apply to their administrative transactions only.

41 U.S.C. § 260 provides:

Sections 5, 8 and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this chapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this chapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 shall be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title.

The parties agree that 41 U.S.C. §§ 252 and 253 apply to the BIA. Since Section 252 does so apply it appears that 41 U.S.C. § 5 does not apply in this case. See 41 U.S.C. §§ 252(a)(1) & (2), 260.

The material facts are not in dispute in this case. On May 25, 1977, the BIA entered into a road construction contract with the Indian Nations Construction Company. The BIA had invited three Indian owned companies to bid for the contract, but only the company contracted with submitted a bid. The bidding was restricted to Indian owned firms and no attempt was made to comply with the advertising provisions of 41 U.S.C. § 253. Plaintiff was not afforded an opportunity to bid.

Purchases of property and services for the United States are governed by the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377. As indicated previously, there is no dispute that 41 U.S.C. §§ 252 and 253, which are sections 302 and 303 of the Act, see 63 Stat. 393-95, apply to the BIA. The court will accordingly turn to the question whether the procedure followed by the BIA in awarding the road construction contract involved in this case contravenes the requirements set out in 41 U.S.C. §§ 252 and 253.

Section 252(c) makes all purchases and contracts for property and services *subject to the advertising requirements* of section 253 *unless* they come within any of the fifteen enumerated exceptions. Defendants contend that the Buy Indian Act comes within subsection (15). There is no contention that any of the other fourteen exceptions apply in this case. Subsection (e)(B) specifically provides that section 252 shall *not* be construed to permit any contract for the construction of roads to be negotiated *without advertising* as required by section 253 unless the contract is to be performed outside the continental United States or *unless* negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-12), or (14) of subsection (c).

Defendants' argument that subsection (e) is an admonition rather than a prohibition and that subsection (c)(15) authorizes negotiation of road construction contracts under the Buy Indian Act is unpersuasive. Congress saw fit to specifically exempt

seven subsections of section 252(c) from the advertising requirements with respect to road construction contracts and did *not* include the "otherwise authorized by law" provision of subsection (c)(15) within this category. This is the subsection on which defendants rely.

The effect of the enumeration of express exceptions in a statute has been stated as follows:

> The specification by the legislature of exceptions to the operation of a general statute, does not necessarily operate to preclude the court from applying other exceptions. However, where express exceptions are made, the legal presumption is that the legislature *did not intend to save other cases from the operation of the statute.* Thus, the rule generally applied is that an exception in a statute amounts to an affirmation of the application of its provisions to all other cases not excepted, and excludes all other exceptions or the enlargement of exceptions made. Under this principle, where a general rule has been established by a statute with exceptions, the courts will not curtail the former, nor add to the latter, by implication. (Emphasis added.)

73 Am.Jur.2d *Statutes* § 316 (1974) (footnotes omitted). The court accordingly concludes that contracts for the construction of roads, such as the contract involved in the instant action, are *not* excepted from the advertising requirements of section 253 by virtue of section 252(c)(15).

Defendants contend, however, that the Buy Indian Act has been interpreted for many years as authoriz-

ing construction contracting with invitations to bid restricted to Indian contractors, and that this administrative construction of the statute is entitled to great weight. Plaintiff contends that 20 BIAM Bulletin 1 of March 3, 1976 (Exhibit D to defendants' brief) represents a new policy, and even if not new, that the statutory interpretation therein espoused is entitled to little or no weight since it is not a contemporaneous statutory construction.

Defendants' exhibits establish at best that the interpretation set forth in the 1976 bulletin may date back as far as 1961. Assuming this to be true for the purpose of plaintiff's summary judgment motion it does not follow that such interpretation is entitled to be given great weight, or any weight, upon the question of the proper statutory interpretation.

Defendants rely on *Udall* v. *Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965), and *United States* v. *Jackson*, 280 U.S. 183, 50 S.Ct. 143, 74 L.Ed. 361 (1930) for the general rule of statutory construction that "great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration." 280 U.S. at 193, 50 S.Ct. at 146. The Court emphasized in *Udall*, however, that the Secretary had consistently construed the executive order and public land order there involved since their promulgation and that this interpretation had been made a repeated matter of public record. 380 U.S. at 4, 17, 85 S.Ct. at 801. Furthermore, the Supreme Court has recognized that

> [i]t has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such construction will not be disturbed except for cogent reasons. See e.g. *Logan* v. *Davis*, 233 U.S. 613, 627 [34 S.Ct. 685, 5 L.Ed. 1121]. But the court is not bound by a construction so established. *Chicago &c. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U.S. 97, 99 [40 S. Ct. 504, 64 L.Ed. 801]. *United States* v. *Dickson*, 15 Pet. 141, 161 [10 L.Ed. 689]. *The rule does not apply in cases where the construction is not doubtful.* And if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons. *Brown* v. *United States*, 113 U.S. 568, 571 [5 S.Ct. 648, 28 L.Ed. 1079]. *Merritt* v. *Cameron*, 137 U.S. 542, 551 552 [11 S.Ct. 174, 34 L.Ed. 772]. *United States* v. *Alabama Railroad Co.*, 142 U.S. 615, 621 [12 S.Ct. 306, 35 L.Ed. 1134]. *United States* v. *Healey*, 160 U.S. 136, 145 [16 S.Ct. 247, 40 L.Ed. 369]. *Studebaker* v. *Perry*, 184 U.S. 258, 268 [22 S.Ct. 463, 46 L.Ed. 528]. *Houghton* v. *Payne*, 194 U.S. 88, 99 [24 S.Ct. 590, 48 L.Ed. 888].

United States v. *Missouri Pacific R.R.*, 278 U.S. 269, 280, 49 S.Ct. 133, 137, 73 L.Ed. 322 (1929) (emphasis added). The Court has also said:

> True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not

be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *United States* v. *Moore*, 95 U.S. 760, 763 [24 L.Ed. 588]; *Logan* v. *Davis*, 233 U.S. 613, 627 [34 S.Ct. 685, 58 L.Ed. 1121]; *Brewster* v. *Gage*, 280 U.S. 327, 336 [50 S.Ct. 115, 74 L.Ed. 457]; *Fawcus Machine Co.* v. *United States*, 282 U.S. 375 [51 S.Ct. 144, 75 L.Ed. 397]; *Interstate Commerce Comm.* v. *N.Y., N. H. & H. R. Co.*, 287 U.S. 178 [53 S.Ct. 106, 77 L.Ed. 248]. The practice has peculiar weight when it involves a *contemporaneous* construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new. *Fawcus Machine Co.* v. *United States, supra.* (Emphasis added.)

Norwegian Nitrogen Products Co. v. *United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358, 77 L.Ed. 796 (1933). And, the Supreme Court further stated in *Missouri Pacific*:

> The language of that provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. *It is elementary that where no ambiguity exists there is no room for construction.* Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation. . . . Construction may not be substituted for legislation. *United*

States v. *Wiltberger*, 5 Wheat. 76, 95-96 [5 L.Ed. 37]. *United States* v. *Fisher*, 2 Cranch 358, 386 [2 L.Ed. 304]. *Lake County* v. *Rollins*, 130 U.S. 662, 670 [9 S.Ct. 651, 32 L.Ed. 1060]. *Caminetti* v. *United States*, 242 U.S. 470 [37 S.Ct. 192, 61 L.Ed. 442]. *Ex parte Public National Bank, ante*, p. 101 [278 U.S. 101, 49 S.Ct. 43, 73 L.Ed. 202]. *United States* v. *Colorado & N. W. R. Co.*, 157 F. 321, 327.

> . . . Where doubts exist and construction is permissible, reports of the committees of Congress and statements by those in charge of the measure and other like extraneous matter may be taken into consideration to aid in the ascertainment of the true legislative intent. But where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended. And in such cases legislative history may not be used to support a construction that adds to or takes from the significance of the words employed. *United States* v. *Freight Ass'n* 166 U.S. 290, 325 [17 S.Ct. 540, 41 L.Ed. 1007]. *Pennsylvania R. R.* v. *Internaitonal Coal Co.*, 230 U.S. 184, 199 [33 S.Ct. 893, 57 L.Ed. 1446]. *Mackenzie* v. *Hare*, 239 U.S. 299, 308 [36 S.Ct. 106, 60 L.Ed. 297]. *Caminetti* v. *United States, supra*, 490 [of 242 U.S. (37 S.Ct. 192)].

278 U.S. at 277-78, 49 S.Ct. at 136. (emphasis added).

The court is of the view that construction of section 252(c) and (e) is not doubtful and that the rule of

deference by the court to an administrative interpretation has therefore no application in this case. Moreover, even if the rule were applicable, defendants have not shown or even contended that the policy challenged in this action has been in effect prior to 1961. The Buy Indian Act has been in effect since 1910 and 41 U.S.C. §§ 252 and 253 have been in effect since 1949. There is accordingly no contemporaneous interpretation involved in this case. It was held in *United States* v. *Manzi*, 16 F.2d 884 (1st Cir. 1926) that a construction not adopted by the department until after a statute had been in operation for fourteen years was entitled to little or no weight upon the question of the proper interpretation of the statute. *See also Citizen Band of Potawatomie Indians of Oklahoma* v. *United States*, 391 F.2d 614, 621, 179 Ct.Cl. 473 (1967), *cert. denied*, 389 U.S. 1046, 88 S.Ct. 771, 19 L.Ed.2d 839 (1968).

For all of the foregoing reasons and on the basis of the authorities heretofore discussed the court concludes that defendants' procedure in connection with awarding the road construction contract involved in this case contravenes the advertising requirements of 41 U.S.C. §§ 252 and 253. Summary judgment is accordingly granted in favor of the plaintiff and against the defendants. Defendants' cross-motion for summary judgment is denied.

In view of the court's conclusion that defendants' procedure in restricting bids with respect to road construction contracts to Indian owned companies contravenes 41 U.S.C. §§ 252 and 253, it is unnecessary to reach plaintiff's alternative constitutional arguments.

Defendants are hereby enjoined from continuing to circumvent the advertising requirements of 41 U.S.C. § 253 in connection with the road construction contract awarded to Indian Nations Construction Company. Defendants are permanently enjoined from circumventing the advertising requirements of section 253 with respect to any future contracts for the construction of roads.

Plaintiff and defendants are directed to file within ten days from the date of this order a joint status report indicating whether road construction work has been commenced pursuant to the contract between defendants and Indian Nations Construction Company, and if so, the percentage of completion of the construction work under the contract. If the parties cannot agree on a joint status report each side will file such a report within the same ten day period.

Plaintiff is directed to file within ten days from the date of this order a brief setting forth the appropriate relief to be granted in this case by way of final judgment in accordance with the views expressed in this order and on the basis of the status of the construction work under the contract challenged in this action. Defendants will have ten days thereafter to file a response brief. The court is particularly concerned with the question of the appropriate equitable relief to be granted with respect to the unperformed balance, if any, of the construction contract in ques-

tion and invites the parties to specifically address this issue in their briefs.

ON MOTION FOR CLARIFICATION

In its order entered March 29, 1978, granting summary judgment in favor of the plaintiff and against the defendants, the court directed the parties to file briefs regarding the appropriate relief to be granted in this case by way of final judgment. The parties have filed such briefs. In addition, defendants have filed a motion for clarification, which motion is accompanied by a brief in support thereof.

Defendants seek clarification of the March 29, 1978 order with respect to the scope of the injunction issued and whether it is a preliminary or permanent injunction. Defendants request separate findings of fact and conclusions of law pursuant to Rule 52(a) Fed.R.Civ.P., and a description in reasonable detail of the acts sought to be restrained pursuant to Rule 65(d) Fed.R.Civ.P.

With respect to the proper relief to be granted in this case, plaintiff requests the court (1) to cancel the construction contract and have the unperformed balance submitted for competitive bidding; (2) to order Indian Nations Construction Company to refund all monies heretofore paid under the contract; and (3) to award plaintiff its costs and attorneys' fees incurred in this action.

Defendants admit that to declare the contract null and void constitutes a reasonable relief in this case

in light of the summary judgment order, but they contend that it would not be proper for the court to order refund of monies paid by the defendants to Indian Nations for work heretofore performed under the contract and to permit plaintiff to recover attorneys' fees.

Defendants' status report reflects that 9.7 percent of the construction contract had been completed when the United States issued a stop order on March 31, 1978. Defendants state that Indian Nations has been paid only for work actually performed and that no money has been advanced to it for anticipated performance.

"Where performance has been entered upon under an illegal bargain the general rule is that the court will leave the parties to the illegal bargain as it finds them." J. Calamarie & J. Perillo, *The Law of Contracts* 567 (1970) (footnote omitted). However, in some instances quasi contractual recovery has been allowed in cases where there has been some performance under an illegal contract. *Id.* at 573.

The court hereby declares the road construction contract entered into between defendants and Indian Nations as null and void. *Schoenbrod* v. *United States*, 410 F.2d 400, 187 Ct.Cl. 627 (1969); J. Calamarie & J. Perillo, *The Law of Contracts* § 376 (1970). However, no refund is to be made of any sums heretofore paid under the contract. Even if the court could order a refund, which is doubtful since Indian Nations is not a party to this action, the court finds that it would be inequitable to require a refund

of monies earned by Indian Nations for work performed in reliance upon and pursuant to the contract. *Cf. Prestex, Inc.* v. *United States*, 320 F.2d 367, 373, 162 Ct.Cl. 620, 626 (1963).

Plaintiff's request that the court order defendants to advertise the unperformed balance of the road construction contract is denied for the reason that it would constitute an improper interference with the executive branch. Defendants as members "of the executive branch of the United States . . . are not subject to supervision or direction by the courts as to how they shall perform the duties imposed by law upon them." *Giancana* v. *Hoover*, 322 F.2d 789, 790 (7th Cir. 1963). *See In re Daley*, 549 F.2d 469, 480 n. 11 (7th Cir. 1977), *cert. denied*, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1978).

Regarding plaintiff's request for costs and attorneys' fees the court notes initially that plaintiff will be free to file its bill of costs with the court clerk within the time limits prescribed by Local Rule 6 and in accordance with Rule 54(d) Fed.R.Civ.P. and 28 U.S.C. §§ 1920 and 2412. The taxability of costs is therefore not properly before the court at this time.

Turning to plaintiff's request for attorneys' fees the court notes that 28 U.S.C. § 2412 provides:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title *but not including the fees and expenses of attorneys* may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States. (Emphasis added.)

"The principle of sovereign immunity precludes the award of costs and fees against the United States 'in the absence of a statute directly authorizing it . . . .'" *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 168 U.S. App.D.C. 111, 113, 512 F.2d 1351, 1353 (1975). *See Parker* v. *Califano*, 182 U.S. App.D.C. 322, 327, 561 F.2d 320, 325, n. 15 (1977). Plaintiff has not cited any statute expressly authorizing attorneys' fees in a case of this type and the court is not aware of any such statute. Plaintiff instead relies on two equitable exceptions to the American rule pursuant to which attorneys' fees cannot be awarded to the successful litigant as a matter of course, *see* Note, 11 Tulsa L.J. 420 (1976), namely, the common fund doctrine and the private attorney general theory. The court is of the view that recovery of attorneys' fees cannot be had against the United States under the equitable exceptions to the American rule in light of the express prohibition contained in 28 U.S.C. § 2412. *Natural Resources Defense Council, Inc.* v. *Environmental*

Protection Agency, 168 U.S.App.D.C. 111, 113, 512 F.2d 1351, 1353 (1975). *See Parker* v. *Califano*, 182 U.S.App.D.C. 322, 327, 561 F.2d 320, 325 n. 15 (1977). Plaintiff has not cited any statute expressly authorizing attorneys' fees in a case of this type and the court is not aware of any such statute. Plaintiff instead relies on two equitable exceptions to the American rule pursuant to which attorneys' fees cannot be awarded to the successful litigant as a matter of course, *see* Note, 11 Tulsa L.J. 420 (1976), namely, the common fund doctrine and the private attorney general theory. The court is of the view that recovery of attorneys' fees cannot be had against the United States under the equitable exceptions to the American rule in light of the express prohibition contained in 28 U.S.C. § 2412. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency*, 168 U.S.App.D.C. 111, 113, 512 F.2d 1351, 1353 (1975). However, even if these equitable doctrines could furnish a basis for an award of attorneys' fees against the United States, the court must nevertheless conclude that plaintiff could not recover in this case under either the common fund doctrine or the private attorney general theory.

Although the common fund doctrine has been expanded considerably by recent Supreme Court decisions, *Hall* v. *Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970); *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184 (1939), it requires that

those benefited by the litigation be an ascertainable class. *See* Note, 11 Tulsa L.J. 420, 424-25, 428 n. 56 (1976). " 'It is necessary to determine . . . that it is plaintiffs effort which caused others to benefit.' " 6 J. Moore, *Federal Practice* Par. 54.77[2], at 1708 (2d ed. 1976) (footnote omitted). Plaintiff has not made the requisite showing here upon which the court could base such a determination.

Plaintiff cites several cases in support of its claim for attorneys' fees pursuant to the private attorney general theory, but fails to mention *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) in which the Supreme Court dealt a death blow to the private attorney general theory. *See* Note, *Alyeska Pipeline Service Co.* v. *Wilderness Society: The Demise of the Private Attorney General Theory as a Basis for Awarding Attorneys' Fees in Public Interest Litigation*, 11 Tulsa L.J. 420 (1976). That theory is therefore no longer a viable exception to the American rule except as it has been revived in the areas of civil rights and taxation with the passage of the Civil Rights Attorney's Fees Awards Act of 1976, Pub.L. No. 94-559, 90 Stat. 2641, codified in 42 U.S.C. § 1988.

In a supplemental brief filed on May 10, 1978, plaintiff concedes that *Alyeska* repudiated the private attorney general theory. Plaintiffs points out, however, that *Alyeska* specifically recognizes the common fund doctrine and plaintiff contends that it is entitled to its attorneys' fees pursuant to a reimbursement plan similar to the one suggested by the Court of

Appeals for the District of Columbia Circuit in *National Treasury Employees Union* v. *Nixon*, 172 U.S. App.D.C. 217, 521 F.2d 317 (1975). The court notes however, that the government in that case was said to have conceded that 28 U.S.C. § 2412 was not directly applicable because the request for attorneys' fees was based on reimbursement from employees benefited by pay adjustments on account of plaintiff's suit and not on reimbursement from the public treasury. *Id.* at 219, 521 F.2d at 319.

Defendants in the instant case cannot be said to have made such a concession. Furthermore, the court cannot ascertain in this case the class which plaintiff claims it has benefited as the court was able to with respect to the federal employees who were entitled to a pay raise in *Nixon*. The court would have to engage in speculation in this case in order to ascertain which contractors might have been or would be awarded which road construction contract. The *Nixon* case is therefore not controlling here. Moreover, the District of Columbia Circuit has held in two cases subsequent to *Nixon* that absent specific statutory authorization section 2412 bars recovery of attorneys' fees against the United States and that the common fund doctrine does not avoid the bar of section 2412 when an award of attorneys' fees would in effect have to be satisfied out of government funds. *Pealo* v. *Farmers Home Administration*, 183 U.S.App.D.C. 225, 562 F.2d 744 (1977); *National Council of Community Mental Health Centers, Inc.* v. *Mathews*, 178 U.S.App.D.C. 237, 546 F.2d 1003 (1976), *cert. denied*, 431 U.S. 954, 97 S.Ct. 2674, 53 L.Ed.2d 270 (1977).

The court accordingly concludes that 28 U.S.C. § 2412 bars an award of attorneys' fees in this case, and that even in the absence of such a statutory bar, plaintiff could not recover attorneys' fees either under the private attorney general theory or the common fund doctrine. Plaintiff's request for attorneys' fees is in all respects denied.

Defendants' motion for clarification is directed toward the following paragraph of the court's order of March 29, 1978 granting summary judgment:

> Defendants are hereby enjoined from continuing to circumvent the advertising requirements of 41 U.S.C. § 253 in connection with the road construction contract awarded to Indian Nations Construction Company. Defendants are permanently enjoined from circumventing the advertising requireuents of section 253 with respect to any future contracts for the construction of roads.

Defendants state that there is disagreement as to the meaning of the first sentence in light of the fact that no further advertising is anticipated in the road construction project and since it is not clear whether it constitutes a preliminary or a permanent injunction. Defendants suggest that the injunction relief ordered in the above paragraph is preliminary and request separate findings of fact and conclusions of law pursuant to Rule 52(a) Fed.R.Civ.P., and a description in reasonable detail of the acts sought to be restrained pursuant to Rule 65(d) Fed.R.Civ.P.

The injunctive relief is part of the final judgment entered this day and constitutes permanent injunctive

relief. Defendants are accordingly now in a position to file their notice of appeal. With respect to defendants' request for separate findings the court notes that Rule 52(a) provides:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. *Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).* (Emphasis added.)

This matter was before the court on motions for summary judgment by both plaintiff and the defendants under Rule 56. There has been full compliance with the rules.

The court is further convinced that the injunctive relief ordered satisfies the detail requirements of

Rule 65(d) and that its meaning is clear. By virtue of the injunctive relief granted in this case defendants are simply commanded to follow the proper procedure in awarding road construction contracts in conformity with the applicable statutes as interpreted in the court's order of March 29, 1978. Defendants are correct when they state that they are not subject to judicial supervision regarding the manner in which they are to perform their responsibilities and exercise their judgment and discretion as members of the executive branch of government. *In re Daley*, 549 F.2d 469, 480 n. 11 (7th Cir. 1977), *cert. denied*, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1978). *Giancana* v. *Hoover*, 322 F.2d 789 (7th Cir. 1963). Obviously, the permanent injunction issued in this case does not in any manner, whatsoever, impinge upon such executive department functions of the defendants, but merely enjoins them from violating applicable statutory provisions, if and when they decide to enter into road construction contracts.

ORDERED this 12th day of May, 1978.

FINAL JUDGMENT

In conformity with the court's orders entered in this action on March 29, 1978 and on this date, it is hereby ordered, adjudged and decreed

(1) that the road construction contract entered into between defendants and Indian Nations Construction Company is null and void;

(2) that no refund is to be made of any sums heretofore paid under the contract to Indian Nations Construction Company;

(3) that defendants are permanently enjoined from circumventing the advertising requirements of 41 U.S.C. § 253 in connection with future road construction contracts.

ORDERED this 12th day of May, 1978.

APPENDIX E

[SEAL]

United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

Memorandum [APR. 27, 1971]

To: Commissioner of Indian Affairs

From: Solicitor

Subject: Negotiability of construction contract under the "Buy Indian" Act of June 25, 1910

Your memorandum of March 23, 1971, requested our opinion concerning the use of Section 23 of the Act of June 25, 1910, 36 Stat. 855, 25 U.S.C. § 47, as authority to enter into negotiated construction contracts with Indians. 25 U.S.C. § 47 reads:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

We believe this will support negotiated construction contracts with Indians.

In considering the scope and applicability of that part of Section 23 of the Act of June 25, 1910 36 Stat. 861, codified as 25 U.S.C. § 47 and conveniently referred to as the "Buy Indian" Act, we must necessarily point out that it confers no substantive authority to contract for anything. See our memorandum of June 20, 1969, to the Assistant Secretary,

Public Land Management. The codified language quoted above was actually a proviso in a section of the 1910 Act which in its entirety reads as follows:

> That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States. Provided, that so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed.

Section 3709 of the Revised Statutes, referred to in the quoted language, is codified as 41 U.S.C. § 5 and requires with certain exceptions that "purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals." Its applicability was limited, in the purchase of Indian supplies pursuant to the 1910 Act, by a provision found in the Bureau of Indian Affairs Appropriation Act of May 18, 1916, 39 Stat. 123, 126, which reads as follows:

> Provided further, that section thirty-seven hundred and nine, Revised Statutes, in so far as that section requires advertisement be made, shall apply only to those purchases and contracts for supplies or services, except personal services, for the Indian field service which exceed in the amount the sum of $50 each, and section twenty-three of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page eight hundred and sixty-one), is hereby amended accordingly.

In legal effect, the $50 limitation of the 1916 amendment was raised to $100 by a provision found in the Act of January 25, 1927, 44 Stat. 934, 936.

The part of Section 23 of the 1910 Act which was not codified as 25 U.S.C. § 47 was, as amended by the 1916 Act, and modified by the 1927 Act, codified as 25 U.S.C. § 93. The net result was a statutory requirement that all contracts in excess of $100 for the purchase of Indian supplies had to conform to the advertising requirements of Section 3709 of the Revised Statutes, except that "purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior."

That portion of the amended and modified 1910 Act which was codified as 25 U.S.C. § 93, and which required compliance with Section 3709 of the Revised Statutes for non-Indian industry Indian supplies contracts in excess of $100, was repealed by Section 4 of the Act of October 10, 1940, 54 Stat. 1109, 1112. The 1940 Act was a substantive enactment of earlier exceptions to Section 3709 of the Revised Statutes, including that previously codified as 25 U.S.C. § 93, and permitted open-market purchasing of supplies by all bureaus of the Department where the aggregate amount of the purchase or service did not exceed $100 in any one instance. The 1940 exemption was

in turn repealed by Section 9(b) of the Act of August 2, 1946, 60 Stat. 809, which engrafted general exceptions on Revised Statutes § 3709 but left unaffected the provisions for open-market purchasing of "the products of Indian industry."

Thus, there is no question of the survival of the authority for negotiated purchases of the products of Indian industry, at least until and, we believe, after, the enactment of the procurement provisions of the Federal Property and Administrative Services Act of June 30, 1949, 63 Stat. 393. For convenience that act, as amended, will be hereinafter be cited to Title 41, United States Code.

41 U.S.C. § 252(a) provides in part that executive agencies shall, with certain exceptions not here material, make purchases and contracts for property and services in accordance with the provisions of the act and the implementing regulations of the Administrator of General Services. That being so, Section 252(c) of Title 41 is applicable:

> (c) All contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if
>
> * * * * *
>
> (15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.

Section 260 of Title 41 provides that any provision of law which authorizes an executive agency to pro-

cure any property or services without advertising "shall be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of the title [quoted above] without regard to the advertising requirements of sections 252(c) and 253 of this title." Thus, we have no difficulty in concluding that the open-market procurement authorized by 25 U.S.C. § 47 is, to the extent of its literal applicability and except as elsewhere limited by statute, "otherwise authorized by law" within the meaning of 41 U.S.C. §§ 252(c)(15) and 260. In applying this exception to the advertising requirements of 41 U.S.C. §§ 252(c) and 253, full compliance with 41 U.S.C. §254 is mandatory. The same is true of the advance payments limitations of 41 U.S.C. § 255, and of the laws specifically made applicable by 41 U.S.C. § 258.

If we are correct in our conclusion that the Federal Property and Administrative Services Act of 1949, as amended, is applicable to Bureau of Indian Affairs procurement, and we believe the literal and mandatory language of the act makes this conclusion inescapable, then 25 U.S.C. § 47 may have considerable significance as an exception to the advertising requirements of 41 U.S.C. §§ 252(c) and 253. Before proceeding, however, it is necessary to examine the provisions of 41 U.S.C. § 252(e):

> (e) This section shall not be construed to (A) authorized the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any con-

> tract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (9)-(11), or (13) of subsection (c) of this section.

The language just quoted is in the form of an explanation or admonition, not a prohibition. It has been explained by the General Counsel of the General Services Administration in this way:

> (e) *No change in requirements regarding construction. repair, etc.*—For clarity, this subsection provides that section [252] does not change the existing requirements for authorization for the erection or repair of buildings, roads, sidewalks, or similar items to be negotiated without advertising as required by section [253] except in the cases as specified in the subsection.[1]

We observe that among the subsection's enumeration of paragraphs of 41 U.S.C. § 252(c) which are excepted from the admonition that § 252 does not authorize negotiated construction and repair contracts, paragraph (15) ("otherwise authorized by law") is not listed. We do not believe the omission is critical to a determination that if negotiated construction and repair contracts are "otherwise authorized by law" they are not subject to the advertising requirements of 41 U.S.C. § 253, and we so hold.[2]

[1] *Federal Property and Administrative Services Act of 1949, as amended, with Analysis and Index*, p. 71 (GC, GSA, Rev. 1958).

This brings us back to the question presented, viz, does 25 U.S.C. § 47 authorize negotiated construction contracts with Indians? The basic question is whether roads, buildings, sewers, utility systems, and the like may be considered to be the "products of Indian industry." We have found no judicial or Departmental decision on the point. There is no meaningful legislative history to indicate the intention of the Congress. There are no qualifying words or phrases elsewhere in the underlying statute. There is no inherent inconsistency in phrase itself. In short, we need only to define the language in its usual sense.

"Product" is defined in Webster's Third International Dictionary (1961) as:

> * * * something produced by physical labor or intellectual effort: the result of work or thought
>
> * * *.

In *Great Western Broadcasting Corporation* v. *N. L. R. B.*, 310 F.2d 591, 595 (9th Cir. 1962), the court said:

> In its broadest sense, the time "product" denotes anything which is produced. Since economic activity includes the rendition of services, it is appropriate, where the context otherwise per-

[2] This section "does not authorize *or change the existing requirements* for authorization for the erection or repair of buildings, roads, sidewalks, or similar items." (Emphasis added) See 1949 U.S. Code Cong. & Adm. News, 1457, 1498.

mits, to refer to a completed service as a "product."

"Industry" in its usual sense is defined, again in Webster's Third International Dictionary (1961), as:

> * * * a use or application of skill or cleverness * * * diligence in an employment or pursuit * * *.

Putting these definitions together, we believe that 25 U.S.C. § 47 will permit the negotiation of contracts, where substantive authority exists, for the purchase by your Bureau of the end product of physical labor or intellectual effort and requiring skill or diligence, of, by, and from Indians. This would include construction and repair of roads, bridges, buildings, and similar things, as well as supplies and services.

In reaching this conclusion, we rely in part on what you represent to be a long period of uninterrupted administrative interpretation of the law. One of the documents submitted with your memorandum reports that "during the past ten years the Bureau has negotiated thousands of contracts with Indians for construction work. The emphasis has occurred in recent years when it has not been uncommon to negotiate as many as 130 contracts for construction work in any given fiscal year. While the monetary value of these contracts has remained below the $100,000 level, there have been contracts for over $1,000,000." Under these circumstances, the administrative construction of the statute, implemented by unchallenged practice for many years, is entitled to great weight.[3] *United States* v. *Jackson*, 280 U.S. 183, 193 (1930); *Udall* v. *Tallman*, 380 U.S. 1 (1965). In addition, the views herein expressed are consistent with the present position of Assistant General Counsel, Division of Business and Administrative Law, Department of Health, Education and Welfare, as stated in his memorandum of September 25, 1970, to the Acting Director, Office of Procurement and Material Management, of that Department.

/s/ Mitchell Melich
MITCHELL MELICH
Solicitor

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[3] We also understand that the appropriations committees of the Congress have been informed of proposals to contract with Indians under the "Buy Indian" Act for construction and maintenance. See e.g., *Hearings on H.R. 12781 before a Subcommittee of the Senate Committee on Appropriations*, 91st Cong., 1st Sess. Pt. 1, pp. 190-194 (1969).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-48

CECIL ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

Petitioners,

v.

GLOVER CONSTRUCTION COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF ARCTIC SLOPE REGIONAL CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

AND

BRIEF OF ARCTIC SLOPE REGIONAL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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July, 1979

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MOTION OF ARCTIC SLOPE REGIONAL CORPORATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Arctic Slope Regional Corporation respectfully moves this Court, pursuant to Rule 42 of the Supreme Court rules, for leave to file the attached brief as amicus curiae in support of the petition for a writ of certiorari in this case. The consent of the Solicitor General, on behalf of

the Petitioners, has been obtained. The consent of the attorney for the Respondent was requested but refused.

The interest of Arctic Slope Regional Corporation in this case arises from the fact that it is a corporation, created by Federal statute in return for the extinguishment of valid land claims to the whole of the North Slope of Alaska and owned by 3500 Alaskan Eskimos, that has wholly-owned subsidiary construction companies that are eligible for negotiated Federal construction projects under the preference given to Indians and other Natives by the Buy Indian Act, 25 U.S.C. Section 47 (1976). The decision of the court below in this case has eliminated the preference of the Buy Indian Act for road and other construction projects and will thereby adversely affect the ability of ASRC's construction subsidiaries, and their Native workers, to obtain Federal contracts. The parties below did not adequately present arguments regarding the effect of this decision on Indian-owned companies, the effect on Alaska native-owned companies in particular, or the unique importance of construction projects to the economic livelihood of Native residents of the State of Alaska. The significance of eliminatng the preference for construction projects to Native-owned construction corporations in Alaska should be reviewed by this Court in its consideration of this petition for writ of certiorari.

Respectfully submitted,

WILLIAM J. VAN NESS, JR.

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1220 Nineteenth Street, N.W.
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BRIEF OF ARCTIC SLOPE REGIONAL CORPORATION AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Arctic Slope Regional Corporation respectfully tenders this brief as amicus curiae for the consideration of the Court in support of the petition for writ of certiorari in No. 79-48. Arctic Slope Regional Corporation supports the position presented therein and urges this Court to grant the writ of certiorari.

THE INTEREST OF ARCTIC SLOPE REGIONAL CORPORATION

Arctic Slope Regional Corporation (hereinafter ASRC) is one of thirteen Native regional corporations created and organized pursuant to the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. Section 16O1 et seq. (1976). The shareholders of the corporation are Native Eskimos who are, and have been for thousands of years, residents of the North Slope of Alaska. The initial assets of ASRC were the land and monetary transfers from the Federal government to those Native residents in settlement of their extensive claims to the lands of the North Slope, which includes the Prudhoe Bay oil reservoir which now provides 8.7 percent of the nation's domestic crude oil production. As a for-profit Native corporation organized pursuant to Federal statute under the laws of the State of Alaska, ASRC has a dual purpose: (1) to engage in profitable undertakings to benefit the Native shareholders of the corporation, and (2) to provide employment opportunities to Native shareholders and other residents of the North Slope of Alaska.

Because of the severe weather conditions in the Arctic, the geographic isolation, and the limited population of the North Slope, economic activity is seasonal and severely limited. The primary non-government opportunity for Native employment and work by local companies is in construction work, much of which is generated by oil and gas exploration and development at Prudhoe Bay and other regions of the North Slope.

ASRC has formed construction company subsidiaries that it intends to be ongoing profit-making business enterprises and that will train and employ the Native residents of the North Slope. These construction companies are eligible for and have sought to obtain Federal construction contracts negotiated pursuant to the Buy Indian Act, 25 U.S.C. Section 47 (1976). The preference for such contracts given to Native-owned companies by the Act offers significant opportunities for these new businesses to gain experience and generate revenues so that they can become viable economic entities.

The decision of the court below, 591 F.2d 554 (10th Cir. 1979), held that the Buy Indian Act preference could not be used by the Department of the Interior, through the Bureau of Indian Affairs (hereinafter BIA), for road construction projects; the lower court's interpretation would encompass other Federal construction projects throughout the United States, including Alaska. If allowed to stand, this decision would eliminate a valuable mechanism for developing the technical and financial ability of Native-owned construction companies in Alaska. The interests of Native construction companies, however, and in particular those of Alaska Natives, were not represented directly in the proceedings below. Therefore, ASRC has a clear interest in seeking reversal of the decision and in providing this Court with an additional perspective on the significance of this case.

REASONS FOR GRANTING THE WRIT

Congress and this Court have historically and consistently acknowledged the unique relationship between the Federal government and Indians, including Eskimos and other Alaska Natives. *Cherokee Nation* v. *Georgia,* 3O U.S. (5 Pet.) 1 (1831). Congress has enacted various statutes to encourage and assist the economic and social development of those groups.

The decision of the court below directly conflicts with those Congressional policies. Moreover, by requiring that all road construction contracts be subject to the advertis-

ing requirements of the Federal Property Act, 41 U.S.C. Section 252-253 (1976). The court below has dealt a serious setback to the efforts of Native-owned companies to secure a place in the economic structure of this country. That result is contrary to the national interest and is not required by the statutes that the court below erroneously interpreted.

A. The Buy Indian Act Implements the Long Standing Congressional Policy of Assisting Native Americans to Develop Economic Self-Sufficiency.

Congress has long recognized that Indians and Alaska natives are among the most disadvantaged citizens in the United States in all facets of life, including income and employment. See, *e.g.*, S. Rept. No. 92-405, 92nd Cong., 1st Sess., 71-72 (1971). Congress has passed numerous Federal statutes to aid indigenous Native people in improving their financial and social well-being. See, *e.g.*, the Snyder Act, 25 U.S.C. Section 13 (1976); the Indian Reorganization Act of 1934, 25 U.S.C. Section 461, et seq. (1976); the Indian Financing Act of 1974, 25 U.S.C. 1451, et seq. (1976); and the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. Sections 450-450n, 455-458e (1976). This Court has, in reviewing such statutes, applied "that eminently sound and vital canon . . . that statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtfull expressions being resolved in favor of the Indians." *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976).

The Buy Indian Act was passed to enable the BIA's predecessor agency to negotiate with Indian tribes for the

purchase of the products of Indian industry as an exception to the general government policy of advertising and having open competition for government contracts for goods and services. Although the language of the Buy Indian Act is general, the Secretary of the Interior, through the Commissioner of Indian Affairs, has interpreted the Act as allowing negotiation with wholly-owned Indian firms on road and other construction contracts. 20 BIAM 1 (1976).

Applying the Buy Indian Act to construction projects is crucial for the Act to have any significant impact. Native groups often lack management experience and do not have a highly trained work force. Consequently, construction companies are often selected as initial business ventures; the level of skills in the Native work force is often most compatible with construction activities. Construction contracts also are generally large and can provide immediate sources of needed capital. Development of native-owned construction companies is even more significant in Alaska where traditional manufacturing and other business activities are not practical due to the long distance from major consumer areas of the lower 48 states and the high cost of doing business in Alaska. In the North Slope area of Alaska, construction associated with oil and gas exploration and development is a principal source of non-governmental jobs.

Much construction activity in the North Slope is funded by government contracts. Millions of dollars in Federal contracting funds have gone to Native-owned companies in Alaska pursuant to the Buy Indian Act. Because the opportunities for additional federal purchase from Native companies in the North Slope and other areas of Alaska are primarily construction related and because the range of other economic activities in the state is limited, the

decision of the court below will severely curtail the infusion of Federal dollars to the the business ventures of Alaska Natives. As described by Judge McKay in his dissent, 591 F.2d at 564-65, the lower court's interpretation of the statute will extend it only to the purchase of products manufactured by Indians, which are limited, and in the case of Alaska Natives of the North Slope, virtually nonexistent. The decision below, therefore, does not merely affect a small portion of the potential economic preference provided by the Buy Indian Act; because of the importance of construction companies to Native groups, the decision will significantly restrict contracting opportunities for Native businesses.

B. Congress Did Not Intend The General Advertising Requirement For Federal Contracts To Supercede The Preference Given For Negotiation Of Contracts With Native Americans.

The court below held that the Federal Property Act, which generally requires the advertising of federal contracts, identifies specific exceptions to the advertising requirements for construction projects. Because 41 U.S.C. Section 252(e)(B) does not reference the exception in 41 U.S.C. Section 252(c)(15), which authorizes negotiation of contracts where authorized by other laws, the court below found that Congress had not provided a statutory exclusion for construction contracts under the Buy Indian Act. The decision of the court below is in error for several reasons.

First, the decision is inconsistent with Congressional intent in passing the Buy Indian act which implemented the long standing Congressional policy, discussed *supra*, to provide significant economic and social programs for Native Americans. The validity of such preference statutes

was upheld by this Court in on *Morton* v. *Mancari*, 417 U.S. 535 (1974), which sustained the preference given to Natives for jobs in BIA.

Second, the decision conflicts with generally applicable rules of statutory construction. As Judge McKay, dissenting in the decision below, pointed out, the Buy Indian Act is special legislation designed to promote economic development and self-sufficiency of natives, whereas the provisions of the Federal Property Act apply to general Federal procurement. Both statutes could coexist if, as in *Morton* v. *Mancari, supra,* the Buy Indian Act were interpreted only as a narrow exemption on behalf of Indians from the general provisions calling for public advertising for bids on government construction contracts. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one regardless of the priority of enactment. *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961).

In addition, two statutes should be read to be consistent wherever possible. Courts have generally sustained Congressional mandates that shield disadvantaged firms from competition to enable them to gain managerial expertise. Even though certain contracts of the Small Business Administration are negotiated and not advertised pursuant to 41 U.S.C. Section 252 and 253, that policy was uphheld against a challenge similar to that filed by Respondent in *Ray Baillie Trash Hauling Inc.* v. *Kleppe*, 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974). The court in *Ray Baillie* found the exception in 41 U.S.C. Section 252(c)(1O), for situations where advertising is "impracticable", to apply in cases where statutes require preference to be given to disadvantaged groups. The court below ignored this exception to the advertising rule. Because that exception is specifically listed in Section 253(e)(B), the court below should have found it to justify

negotiation for construction contracts under the Buy Indian Act.

Finally, the court below ignored the language of the Federal Property Act and its legislative history. The Act did not even apply to the BIA until 1965 when Congress passed amendments that imposed its advertising requirements on all Federal agencies, not just the General Services Administration. But in doing so, Congress specifically provided that "this *chapter* does not apply - . . . (2) when this chapter is made inapplicable pursuant to . . . any other law." (emphasis added) 41 U.S.C. Section 252(a). Consequently, the restriction in Section 252(e) is not applicable where the Buy Indian Act preference is invoked by BIA. Congress was explicit in its intent not to disturb previously enacted exemptions to advertising requirements: "[T]he section makes clear that the limited exceptions specified . . . in any other law, are not eliminated by this section . . ." H. Rept. No. 1166, 84th Cong., 1st Sess., 7 (1965), as reprinted in [1965] U.S. Code Congressional and Administrative News, 4223. The position of the court below that the enactment of general advertising requirements evidenced an intent by Congress to overturn the longstanding specific preference to be given to Native workers and companies is simply without support.

CONCLUSION

For the foregoing reasons, Arctic Slope Regional Corporation as amicus curiae urges this Court to grant the petition for a writ of certiorari.

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A MOTION TO DISPENSE WITH THE PRINTING OF THE RECORD WAS MADE AND GRANTED. THAT IS WHY NO APPENDIX APPEARS AT THIS POINT.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-48

CECIL D. ANDRUS, Secretary of the Interior, ET AL.,
Petitioners,

VERSUS

GLOVER CONSTRUCTION COMPANY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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OPINION BELOW

The citations to the opinions in the United States Court of Appeals and the District Court contained in the Petition for Writ of Certiorari are accurate.

JURISDICTION

The statement of jurisdiction contained in the Petition is accurate.

QUESTION PRESENTED

The question presented is accurately and succinctly stated in the Petition.

STATUTORY PROVISIONS INVOLVED

The Petition accurately and adequately sets forth the statutory provisions involved.

THE PARTIES

The parties herein will be referred to as they appeared in the Court of Appeals for the Tenth Circuit; that is Petitioners (The Secretary of the Interior, *et al.*) as Appellants or the Government and Respondent (Glover Construction Company) as Appellee.

STATEMENT OF THE CASE

In March of 1976 Appellants, by and through the Commissioner of Indian Affairs, issued a memorandum interpreting 25 U.S.C. § 47, recently known as the Buy Indian Indian Act. 25 U.S.C. § 47 was originally a proviso to a statute passed in 1910. Under the 1976 interpretive memorandum, bidding on contracts with Appellant's agency is restricted to Indian owned companies. Non-Indian companies are permitted to bid only if Indian companies are not available.

On March 25, 1977, a contract for the construction of five miles roadway in Pushmataha County, Oklahoma, was awarded to Indian Nations Construction Company. Appellee requested the opportunity to bid on the project, but was not permitted to bid because Appellee's company is not Indian owned. The contract price was $1,219,481.00. The engineer's estimate was $963,117.48. The first five miles of the roadway was built by Appellee, under normal bidding procedures, at a price of $538,000.00.

Appellee filed suit in the district court, asserting that the agency's interpretation of 25 U.S.C. § 47 was arbitrary, capricious, and unreasonable, and that the same was in violation of 41 U.S.C. § 253. Appellee further asserted that the contract with Indian Nations was void for the same reasons the agency's interpretation of the statute was invalid. Both parties filed motions for summary judgment.

41 U.S.C. § 252(c) makes all purchases and contracts for property and services subject to the advertising requirements of Section 253 of that title, unless the contract comes within one of the fifteen enumerated exceptions of Section 252(c). Subsection (e)(B) of Section 252 specifically provides that Section 252 shall not be construed to permit any contract for the construction of roads to be negotiated without advertising as required by Section 253, unless the contract is to be performed outside the Continental United States or unless negotiation is authorized by paragraphs (1)-(3), (10)-(12), or (14) of subsection (c) of Section 252.

In the district court, Appellants asserted that the negotiation of roadway contracts by the Bureau of Indian Affairs was permitted under the "otherwise authorized by law" exception stated in paragraph 15 of Section 252(c). In support thereof, appellants argued that Section 252(e) was merely an admonition and not a prohibition. Also, they urged that 25 U.S.C. § 47 has been interpreted for many years to allow construction contracts to be restricted to only Indian contractors.

The district court rejected the argument that 252(e) was merely an admonition (Petition of Appellant, App. D,

40a). The court noted that Congress specfically exempted seven subsections of Section 252(c) with respect to road construction, but did not include the "otherwise authorized by law" provision of subsection (c)(15) (Petition of Appellant, App. D, 40a).

The Court went on to find that the rule of deference to an administrative interpretation did not apply to this case because the statute was enacted in 1910 and the complained of interpretation, set forth in the 1976 bulletin, may date back as far as 1961 (Petition of Appellant, App. D, 46a).

The court's judgment declared the complained of contract null and void and permanently enjoined the appellants from "circumventing the advertising requirements of 41 U.S.C. § 253 in connection with future roadway construction contracts".

Thereafter, the Government appealed to the 10th Circuit Court of Appeals. The above mentioned arguments were again asserted by the Government and were rejected by the appellate court. In addition thereto, the Government argued that the district court had erroneously concluded that the Federal Property and Administrative Services Act impliedly repealed 25 U.S.C. § 47 and that negotiated roadway contracts should be permitted under a liberal interpretation of 25 U.S.C. § 47, in order to accomplish the remedial purposes of the act.

The court found no conflict, and thus no implied repeal, in 41 U.S.C. §§ 252 and 253 and 25 U.S.C. § 47. The court simply declined to accept the position that the purchase of "Indian supplies" and "products" on the "open market" related to roadway construction contracts (Petition of Appellant, App. A, 14a). The court noted that "It is clear, on its face, however, that the Congress did intend that U.S.C.A. §§ 252 and 253 apply to road construction projects" (Petition of Appellant, App. A, 15a).

The court acknowledged that 25 U.S.C. § 47 is a remedial act and is to be given a liberal interpretation. However, the court noted: "Even so, we believe it strains the most liberal construction to conclude the act's preference for purchase of "Indian supplies" and "products" applies to a roadway construction project whose contract price, through Indian construction, is $1,219,481.00 (Petition of Appellant, App. A, 19a).

The decision of the district court was AFFIRMED.

REASONS WHY THE PETITION FOR WRIT SHOULD BE DENIED

The evidence in the instant case certainly does not support the Government's appraisal of the importance of, and the value of, the complained of policy to the Indian community.

Depositions of BIA officials revealed that the Government had made no inspections or investigations to ascertain whether Indian workmen were being employed on the project in question. From the depositions, it clearly appeared that there was not one shred of evidence which showed that even one Indian employee or laborer had benefited from the complained of policy. The record further disclosed that the real beneficiaries of the policy were the corporate officials of Indian Nations Construction Company. The president, Billie W. Crain, a one-quarter (¼)

degree Seminole Indian, lists his occupation as an administrative Law Judge with the Department of Health, Education and Welfare, and states his net worth at $186,546.00. The Vice-President, Nat Marshall, one-quarter (¼) degree Choctaw, lists his occupation as self-employed rancher and construction, and states his net worth at $455,350.00. The treasurer and general manager, Hubert Day, a non-Indian, states his net worth at $1,350,000.00.

These facts are particularly significant when it is remembered that the contract price on the roadway in question was $1,219,481.00; that the engineer's estimate of the construction costs was $963,117.48; and that the first five miles of roadway on the same road, under competitive bidding, was $538,000.00.

Simply stated, the record in this case simply does not support the Government's assertions that the policy in question is of great benefit to the Indian community. On the other hand, the record indicates that the policy in question does generate windfall profits for administrative law judges and wealthy businessmen of marginal Indian blood.

Appellees would urge this Court to consider the practical aspects of this case. Appellee has simply requested that the Government be compelled by the courts to obey the law, and for reimbursement for his attorney fees and costs. In Appellee's quest to require the Government to comply with the law, he has been confronted at each step of the proceedings with vigorous resistance from the Department of Justice, with all of its manpower and resources. It has been very expensive. It has been difficult;

and, in some respects, it has been frustrating and unrewarding. During almost all the time this case has been on appeal to the 10th Circuit, then to this Court, the enforcement of the injunction has been stayed at the Government's request. Even though the district court declared the contract in question null and void, the Government has been free, during most of the time since that ruling, to carry out the illegal contract and enter into new illegal contracts.

The two distinguished courts have found little difficulty in determining that the Government's position is contrary to law. Unless this litigation is completed expeditiously, the roadway in question will be completed and this Appellee will have, as a practical matter, achieved virtually nothing.

The Government's capacity to finance seemingly endless appeals and stay orders has a very chilling impact on any undertaking to force the Government to obey the law.

This Appellee is ready, willing, and able to try this case on the merits if this Court grants certiorari; however, this Appellee would respectfully request that, if certiorari is granted, the Court reconsider its holding in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 250, wherein this Court eliminated the private attorney general theory as a basis for awarding attorney fees in this type of litigation.

The Government, in urging this Court to grant certiorari, suggests that the language of 25 U.S.C. § 47 should be broadly construed to include roadway construction be-

cause the act was intended to encourage Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements. Further, that the remedial purposes of the act require a liberal construction (Petition of Appellant, p. 14).

The language of the statute, and the circumstances surrounding its enactment, do not support the above stated conclusions. 25 U.S.C. Sec. 47 provides:

> "So far as may be practicable Indian labor shall be employed and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior."

Section 47 was codified from the act of June 25, 1910, ch. 431, § 23, 36 Stat. 861 which provides in its entirety as follows:

> "That thereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty seven hundred and nine of the Revised statutes of the United States: Provided, that so far as may as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior. All acts and parts of acts in conflict with the provision of this section are hereby repealed."

Section 3709, now codified as 41 U.S.C. § 5, required advertisement before purchases were made by governmental agencies. Thus, we find 25 U.S.C. § 47 was merely a proviso in a legislative act that had as its unquestionable purpose the aim of making the purchase of "Indian supplies" subject to the advertising requirements of the law.

It is generally held that the proper function of a proviso is to restrict, limit or qualify some portion of the enacting clause of the statute wherein it is contained. Provisos should be strictly construed.

With the facts concerning the enactment of Section 23 of the Act of June 25, 1910, in mind, and applying general rules of construction, the proper interpretation of Section 23 is clear. Congress intended that the purchase of "Indian supplies" be subject to advertising requirements, but that in obtaining those supplies the Secretary of Interior, when it was practical to do so, could show a preference for Indian labor and Indian products or articles available in the open market.

Within the context of this case two inescapable questions arise:

1) Does five miles of roadway, costing over a million dollars, fall into the category of "Indian supplies"?

2) Is five miles of roadway in Pushmataha County, Oklahoma, a "product" or article for sale on the "open market"?

Plaintiff submits to the Court that the only reasonable answer to the foregoing questions is "no". To interpret the statute in question so that five miles of roadway in Pushmataha County, Oklahoma, could qualify as "Indian supplies" or an "Indian product" available on the "open market" would be virtually to ignore numerous admonitions by this Court on statutory interpretations.

> "The plain, obvious, and rational meaning of statute should be preferred to any curious, narrow hidden sense." *Old Colony R. Co* v. *Commissioner of Internal Revenue,* 284 U.S. 552, (1932).

> "The Supreme Court must read a statute according to the natural and obvious import of the language without resorting to subtle and forced construction for the purpose of either limiting or extending its operation." *U. S.* v. *Temple,* 105 U.S. 97, (1882).
>
> "The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Sanborn* v. *Commissioner of Internal Revenue,* 301 U.S. 700 (1937).

Respondent submits to the Court that it would, indeed, take an acute and powerful intellect to conceptualize five miles of roadway as being within the purview of "Indian supplies" and "products" available on the "open market". On the other hand, the plain, obvious import of the language is that, with respect to such commodities as bolts of cloth, foodstuffs, blankets, or even electronic calculators, a preference in favor of Indian labor and Indian-made articles is appropriate where it is practical to grant such a preference.

In light of the foregoing, it is apparent that 25 U.S.C. § 47 has no application to the roadway construction project which is the subject matter of this lawsuit, and that only an unusually strained, arbitrary and unreasonable construction of the statute would make it controlling.

It is generally agreed upon by all parties that 25 U.S.C. § 47, because of its remedical nature, should be liberally construed. A liberal construction does not authorize a court, or an administrative agency, to place a construction upon the language which substitutes its concept of what is right

for the actual legislative intent. In *62 cases of Jam* v. *United States,* 340 U.S. 593, 600 this Court stated:

> "In our anxiety to effectuate the congressional purpose of protecting the public, we must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."

Also, the Government urges this Court to grant certiorari because the two previous courts' reliance on § 252 (e)(B) was misplaced (Petition of Appellant, p. 17). It is argued that 41 U.S.C. § 260 was enacted to preserve existing exemptions from competitive bidding requirements, and that the same exempts the BIA from following Sections 252 and 253. That the existing exemption to be preserved arises from the Buy Indian Act. Thus, it clearly appears that the assertion that Section 260 relieves the BIA from advertising is predicated entirely on the position that the Buy Indian Act embraces roadway construction projects. The district court and the Court of Appeals held that it did not. Appellee has previously stated herein its reasons for suggesting that the act does not so apply.

The conclusions of the two lower courts is supported by the expression of Congressional intent concerning the passage of 41 U.S.C. § 252 in 1949 by the following statement found in *House Report No. 670,* May 24, 1949, 81st Cong., 1st Sess., 1949 U.S. Code Cong. and Adm. News, 1457, 1498 wherein it stated:

> "(e) For clarity this subsection provides that Section 302, 41 U.S.C. 252, does not authorize or change the existing requirements for authorization for the erection or repair of buildings, *roads,* sidewalks, or similar items." (emphasis added)

Clearly, twelve years later in 1961, or arguably 27 years later in 1976, the BIA, without the aid of Congress, has attempted to carve out a new exemption or change in the existing requirements for the erection of roads.

CONCLUSION

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 79-48

In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

GLOVER CONSTRUCTION COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-48

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

GLOVER CONSTRUCTION COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 591 F.2d 554. The opinion of the district court (Pet. App. 34a-58a) is reported at 451 F. Supp. 1102.

JURISDICTION

The judgment of the court of appeals (Pet. App. 32a) was entered on January 11, 1979, and the Sec-

retary's petition for rehearing was denied on March 12, 1979 (Pet. App. 33a). On May 30, 1979, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including July 10, 1979, and the petition was filed on that date. The petition was granted on November 26, 1979. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Buy Indian Act, 25 U.S.C. 47, authorizes the Secretary of the Interior to enter into road construction contracts with Indian-owned companies without publicly advertising pursuant to the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 253.

STATUTES INVOLVED

The Buy Indian Act, 25 U.S.C. 47, provides:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

Section 302 of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 252, provides in pertinent part:

> (a) Executive agencies shall make purchases and contracts for property and services in accordance with the provisions of this subchapter and implementing regulations of the Administrator; but this subchapter does not apply—

> (1) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or
>
> (2) when this subchapter is made inapplicable pursuant to section 474 of title 40 or any other law, but when this subchapter is made inapplicable by any such provision of law, sections 5 and 8 of this title shall be applicable in the absence of authority conferred by statute to procure without advertising or without regard to said section 5 of this title.
>
> * * * * *
>
> (c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—
>
> * * * * *
>
> (10) for property or services for which it is impracticable to secure competition;
>
> * * * * *
>
> (15) otherwise authorized by law, except that section 254 of this title shall apply to purchases and contracts made without advertising under this paragraph.
>
> * * * * *
>
> (e) This section shall not be construed to (A) authorize the erection, repair, or furnishing of any public building or public improvement, but such authorization shall be required in the same manner as heretofore, or (B) permit any contract for the construction or repair of buildings, roads, sidewalks, sewers, mains, or similar items

to be negotiated without advertising as required by section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section.

Section 303 of the Act, 41 U.S.C. 253, provides:

Whenever advertising is required—

(a) The advertisement for bids shall be made a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned. No advertisement or invitation to bid for the carriage of Government property in other than Government-owned cargo containers shall specify carriage of such property in cargo containers of any stated length, height, or width.

(b) All bids shall be publicly opened at the time and place stated in the advertisement. Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided*, That all bids may be rejected when the agency head determines that it is in the public interest so to do.

Section 310 of the Act, 41 U.S.C. 260, provides:

Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services

made by an executive agency pursuant to this subchapter. Any provision of law which authorizes an executive agency (other than an executive agency which is exempted from the provisions of this subchapter by section 252(a) of this title), to procure any property or services without advertising or without regard to said section 5 of this title shall be construed to authorize the procurement of such property or services pursuant to section 252(c)(15) of this title without regard to the advertising requirements of sections 252(c) and 253 of this title.

STATEMENT

1. The Buy Indian Act (the Act), 25 U.S.C. 47,[1] directs the Secretary of the Interior to employ Indian labor "[s]o far as may be practicable," and permits him to purchase "the products of Indian industry * * * [the] open market."[2] The implementing regulations of the Bureau of Indian Affairs (BIA) provide "that all [BIA] purchases or contracts be made or entered into with qualified Indian contractors to the maximum practicable extent." 20 BIAM Bull. 1 (March 3, 1976) App. B, *infra*, 5a-6a;[3] see also 25

[1] The Buy Indian Act is the common name for Section 23 of the Act of June 25, 1910, ch. 431, 36 Stat. 861.

[2] The Secretary has delegated his responsibilities and powers under the Act to the Commissioner of the Bureau of Indian Affairs of the Department of the Interior. See Departmental Manual, Ch. 1, Part 230.

[3] Indian is defined as "a member of an Indian tribe or otherwise considered to be an Indian by the tribe with which affiliation is claimed," and an Indian contractor is an entity that is "100% Indian owned and controlled." *Id.* at 6a. The Bulletin is reprinted as an appendix to this brief (App. B, *infra*, 5a-7a).

C.F.R. 162.5a. Contracts let under these provisions may be awarded by negotiation or by competitive bid restricted to qualified Indian contractors. See 41 C.F.R. 14H-3.215-70; 25 C.F.R. 162.5a; 20 BIAM Bull. 1, App. B, *infra*, 6a-7a.[4] If the contracting officer determines that there are "no qualified Indian contractors within the normal competitive area that can fill or are interested in filling the procurement requirement," then non-Indian contractors may be considered. *Id.* at 6a.

In 1976 and 1977, the local office of the BIA in Muskogee, Oklahoma prepared plans for the repair and improvement of a five-mile segment of road in Pushmataha County, Oklahoma. The road, which is called the Honobia Road, is located within an Indian area subject to BIA regulation. See 23 U.S.C. 101 (a); *Morton* v. *Ruiz*, 415 U.S. 199, 212 (1974). In accordance with the Act and regulations described above, BIA invited three Indian-owned construction companies to submit bids on the Honobia Road project. Respondent, a non-Indian contractor, was not afforded an opportunity to bid. On May 25, 1977 BIA awarded the approximately $1.2 million contract to Indian Nations Construction Company, a

[4] In some circumstances, negotiations must comply with the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203, and regulations thereunder. See 41 C.F.R. 14H-70.000 *et seq.* and 44 Fed. Reg. 62510-62515 (1979). In all cases, the contract price must be "fair and reasonable." 20 BIAM Bull. 1, App. B, *infra*, at 7a.

100% Indian owned and controlled corporation (Pet. App. 2a-3a, 39a).[5]

2. Respondent then instituted this suit in the United States District Court for the Eastern District of Oklahoma, naming as defendants the Secretary of the Interior, the Department of the Interior itself, BIA, and the BIA contracting officer on the Honobia Road project. Relying on 41 U.S.C. 5 and the Federal Property and Administrative Services Act of 1949 (the FPASA), 41 U.S.C. 252, 253, respondent primarily contended that the defendants were

[5] Although irrelevant to the legal issues raised here, we note that respondent has misstated (Br. in Opp. 5-6) the evidence before the district court in several respects. First, Billie W. Crain and James Allen Crain, Seminole Indians, and Nat Marshall, a Choctaw Indian, are the sole owners and directors of Indian Nations (Exhs. A-C to Gov't Motion For Summary Judgment). Hubert Day, a non-Indian, is merely the construction superintendent (Wing Dep. 19-20; Donahoe Dep. 11). Moreover, although the abbreviated record shows that Indian Nations employs at least one non-Indian (Hubert Day), Indian Nations does employ Indians in both management and labor positions (Wing Dep. 10-14, 21-22, 42-44; Donahoe Dep. 8-11).

Respondent also suggests (Br. in Opp. 6) that the use of Indian firms to build roads is undesirable because the first five-mile section of the Honobia Road was built by a non-Indian firm for approximately $500,000, whereas Indian Nations proposed to build the second five-mile segment for approximately $1.2 million. See also Pet. App. 19a. Respondent fails to disclose, however, that the second five-mile portion involved substantially more difficult terrain and that the contract specifications for the second half of the project required twice as thick a road as the first half in order to permit logging operations in that area (Wing. Dep. 31; Donahoe Dep. 46-47; Nordwall Dep. 25-26). The contract price was approved both by the BIA and the Federal Highway Administration.

required to advertise publicly for bids on the Honobia Road project and that the Buy Indian Act does not authorize the unadvertised negotiation of road construction contracts. In addition, respondent asserted that petitioners' actions had denied it due process and equal protection of the laws. Respondent therefore asked the district court to set aside the Honobia Road contract and to enjoin petitioners from invoking the Buy Indian Act to circumvent the bidding requirements of the FPASA in the future.

The district court granted summary judgment for respondent (Pet. App. 34a-58a). The court concluded that 41 U.S.C. 252(c) and 252(e)(B) override the Buy Indian Act and require that the government advertise road construction contracts in accordance with 41 U.S.C. 253.[6] Section 252(c) provides that agency purchases and contracts "shall be made by advertising, as provided in section 253 of this title," unless one of 15 enumerated exceptions is applicable. 41 U.S.C. 252(c). Section 252(e)(B) further states that Section 252 shall not be construed to permit the letting of road and other major construction contracts without advertising "unless negotiation of such contract is authorized by the provisions of paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section." The court acknowledged (Pet. App. 41a-42a) that the Buy Indian Act fell

[6] The court found that because the FPASA (41 U.S.C. 251 *et seq.*) governed this case, 41 U.S.C. 5 was inapplicable (Pet. App. 39a). In light of its statutory holding, the court declined to address respondent's constitutional arguments (*id.* at 46a-47a).

within exemption 15 as an exception to the public advertising requirement "otherwise authorized by law." See 41 U.S.C. 252(c)(15). It held, however, that because Section 252(e)(B) does not refer to exemption 15, the Buy Indian Act does not authorize the negotiation of road construction contracts. The court rejected the Secretary's contrary administrative construction as inconsistent with the plain language of the FPASA (Pet. App. 42a-46a).[7]

Accordingly, the court, in a final judgment entered on May 12, 1978, declared the road construction contract between BIA and Indian Nations null and void (Pet. App. 49a-58a).[8] Although the court declined to "order [petitioners] to advertise the unperformed balance of the road construction contract" (*id.* at 50a), it permanently enjoined petitioners "from circumventing the advertising requirements of 41 U.S.C. § 253 in connection with future road construction contracts" (Pet. App. 58a).

3. The government appealed and a divided panel of the court of appeals affirmed (Pet. App. 1a-31a). Relying primarily on the analysis of the district court, the court of appeals first indicated that the Buy Indian Act did not relieve the Secretary of the advertising requirements set forth in the FPASA (Pet.

[7] The court observed that in any event the administrative construction was entitled to little deference because it was not contemporaneous with the enactment of the Buy Indian Act (Pet. App. 46a).

[8] The court rejected respondent's request to order Indian Nations to refund the monies previously paid on the contract for work done (Pet. App. 49a-50a, 58a).

App. 7a-13a). The court stated that, in enacting the FPASA, Congress must be deemed to have been "fully cognizant of the Buy-Indian Act of 1910" and that although Congress was "capable of clearly and directly providing the interpretation of the Buy-Indian Act here urged by the Government * * * it did not elect to do so" (Pet. App. 17a). Suggesting that Congress' failure in this regard was "a political question beyond the jurisdiction of the courts," the court refused to " 'fill the gap' by engaging in judicial lawmaking" (*ibid.*).

In addition, the court of appeals held that the Buy Indian Act does not apply to road construction contracts and that therefore this Court's decision in *Morton* v. *Mancari*, 417 U.S. 535 (1974), was inapposite (Pet. App. 13a-15a). The court recognized "that the remedial Buy-Indian Act is to be given a liberal construction in order to effectuate the purpose for which it was enacted" (*id.* at 19a). It nonetheless opined that "it strains the most liberal interpretation to conclude that the Act's preference for purchase of 'Indian supplies' and 'products' applies to a roadway reconstruction project whose contract price, through Indian Construction, is $1,219,481.00" (*ibid.*). Referring to the difference between that contract price and the cost of the initial five miles of roadway (but see note 5, *supra*), the court of appeals further observed "that a primary, significant *remedial* feature of the advertisement and competitive bidding requirements of the Federal Property and Administrative Services Act of 1949 is to obtain the best and

lowest bid for the benefit of the American taxpayers in 'high cost' construction categories" (Pet. App. 19a-20a).

Judge McKay dissented (Pet. App. 21a-31a), arguing that the court had "reache[d] a result hostile to the remedial purposes of the Buy Indian Act" because of rigid adherence "to formalistic rules of statutory construction" (*id.* at 21a). Judge McKay identified "[t]he real issue in this case [as] the extent to which the Buy Indian Act * * * retains vitality in light of the advertising requirements of the Federal Property [and Administrative Services] Act" (*ibid.*). Judge McKay began his analysis by outlining the purpose and history of the Buy Indian Act. He observed that the "Act announces a congressionally approved policy of preferring Indian labor and products and grants the Interior Secretary discretionary power to purchase Indian products in the open market," and that pursuant to that policy the Department of the Interior had established a road construction program that "has provided substantial economic encouragement to Indian construction enterprises" (Pet. App. 22a). He pointed out that "[t]he obvious purpose of the Buy Indian Act is to encourage Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements," and that the legislative history, albeit scanty, "manifests a clear purpose to except purchases of Indian products from advertising requirements" (*ibid.*).

Accordingly, Judge McKay faulted the majority for ignoring the remedial purpose of the Act merely

because nothing in the language or legislative history of the Act specifically refers to road construction work (Pet. App. 25a-26a). He contended (*id.* at 26a-27a) that such a construction might "make the Act applicable to nothing at all" or, at a minimum, would limit the Act to Indian economic activities that were actually being conducted in 1910. As a result, the Buy Indian Act would be relegated "to a role of protecting Indian handicraft and trinket production—economic activities that probably require no preferential treatment at all" (*id.* at 27a). That conclusion, the dissent argued, conflicts with the well-established rule that "statutes passed for the benefit of [Indians] are to be liberally construed, doubtful expressions being resolved in [their] favor" (*ibid.*, quoting *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976)). Judge McKay finally concluded that the teaching of *Morton* v. *Mancari*, *supra*, required the court to "sustain both" the Buy Indian Act and the FPASA "in a way that vitiates neither" (Pet. App. 31a).[9]

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[9] Judge McKay further noted that a blanket injunction was improper because the Secretary might exercise his discretion under 41 U.S.C. 252(c)(10) and conclude that advertised bidding was impracticable in light of the purposes of the Buy Indian Act. See *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696, 708 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974). On December 18, 1979, the Commissioner of BIA issued a class determination and finding under 41 U.S.C. 252(c)(10) regarding the impracticability of advertising contracts for supplies and services including construction within BIA's jurisdiction. A copy of this determination is provided in App. C, *infra*, 8a-10a.

SUMMARY OF ARGUMENT

I

The Buy Indian Act empowers the Secretary of the Interior to employ "Indian labor" and to purchase "the products of Indian industry." Although the court of appeals concluded that the Act does not apply to road construction contracts, nothing in the language of the Act suggests such a narrow interpretation. To the contrary, no restrictive modifier limits the scope of "products" and "labor" and there is thus little justification for construing those sweeping terms as covering only traditional Indian industries. Indeed, such a narrow construction violates the well-established principle that remedial statutes such as the Buy Indian Act should be "liberally construed, doubtful expressions being resolved in favor of the Indians." *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979), slip op. 10; *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918).

In any event, the legislative history reflects that Congress intended the Act to govern a broad range of activities, including construction work. The Act is derived from a long series of Indian appropriations acts between 1886 and 1908. In allocating money for various construction projects, including road construction work, Congress made clear that the Secretary of the Interior was to use Indian labor and products as much as possible. See, *e.g.*, Act of Apr. 30, 1908, ch. 153, 35 Stat. 71. Moreover, the pertinent legislative debates show that Congress an-

ticipated that Indians and their teams would be able to contract for all or part of substantial construction projects. See 42 Cong. Rec. 1695 (1908); 45 Cong. Rec. 6097 (1910).

The court of appeals also failed to defer to a long standing, consistent administrative construction of the Act. The contemporaneous annual reports of the Secretary of the Interior and the Commissioner of Indian Affairs demonstrate that the officials charged with administering the Act unequivocally construed it to cover all ordinary industrial activities, including road building. For example, in 1911, the first year following passage of the Act, the Commissioner reported that he had used Indians "wherever practicable" in "the construction of roads, trails, and telephone lines." *Annual Report of the Commissioner of Indian Affairs* 17 (1911), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1911.* And more recently, as Indians have established corporate entities, the Secretary has consistently accorded a preference to the products of these corporations. In fact, Congress has been specifically informed of the Secretary's view that the Bureau of Indian Affairs road construction program is subject to the Act and has nonetheless continued to fund that program. See *Department of the Interior and Related Agencies Appropriations for Fiscal Year 1970: Hearings on H.R. 12781 Before a Subcomm. of the Senate Comm. on Appropriations,* 91st Cong., 1st Sess., Part 1, 166, 190-194 (1969).

Finally, we submit that the decision of the court of appeals frustrates the clear congressional purpose that informs the Act. Congress has explicitly recognized that federal assistance such as the Buy Indian Act is critical to the existence of significant Indian industry. The decision of the court of appeals would limit or destroy the effectiveness of the Act; traditional Indian industries like the production of jewelry or trinkets require no protection, whereas fledgling Indian enterprises in more competitive areas such as construction will be—and already have been—forced out of business in the absence of protective legislation.

II

The courts below also erroneously concluded that the Federal Property and Administrative Services Act of 1949, as amended (FPASA), impliedly repealed the Buy Indian Act. In *Morton* v. *Mancari,* 417 U.S. 535, 541-551 (1974), this Court made clear that laws of general application do not abrogate longstanding Indian preference legislation, unless there are affirmative indications that Congress meant to do so. Here, however, the language and legislative history of the statutes in question unequivocally demonstrate that Congress intended to preserve the Buy Indian Act as an exception to general advertising requirements.

As originally enacted, the Buy Indian Act constituted an express exception to the general advertising statute then in existence, Section 3709 of the Revised Statutes. Although Congress has amended both

the Act and Section 3709 from time to time, there is no doubt that the Act still remains an exception to Section 3709. The Act authorizes "open market" purchases of Indian products rather than requiring advertised bidding. Section 3709 in its current form explicitly provides that it does not apply where "otherwise provided [by] * * * other law." 41 U.S.C. 5. And the legislative history makes clear that that language preserves historical exceptions to the advertising laws such as the Buy Indian Act.

Similarly, the language and the legislative history of the FPASA reflect Congress' intent to preserve, not repeal, the Buy Indian Act. Three different sections of the FPASA expressly state that laws such as the Buy Indian Act which authorize the negotiation of government contracts are not subject to the bidding requirements of Section 303 of the FPASA, 41 U.S.C. 253. See 41 U.S.C. 252(a)(2), 252(c)(15), 260. In particular, Section 310 specifies that "[a]ny provision of law which authorizes an executive agency * * * to procure any property or services without advertising or without regard to * * * [section 3709] shall be construed to authorize the procurement of such property * * * without regard to the advertising requirements of [the FPASA]." 41 U.S.C. 260. The congressional reports confirm that all laws that are "exemptions from the requirements of Revised Statutes, section 3709 * * * are preserved [under the FPASA]." H.R. Rep. No. 1166, 89th Cong., 1st Sess. 8 (1965); S. Rep. No. 274, 89th Cong., 1st Sess. 5 (1965).

Respondent's reliance on Section 302(e) of the FPASA, 41 U.S.C. 252(e) is simply misplaced. That provision establishes only that less than all of the advertising exemptions created by the FPASA in Section 302(c) apply to major construction, including road building. Here, however, the road construction contract was negotiated pursuant to the Buy Indian Act and not Section 302(c). Accordingly, Section 302(e) is inapposite. As the pertinent legislative reports point out, Section 302(e) "does not authorize or change the existing requirements for authorization for the erection or repair of buildings, roads, sidewalks, or similar items." H.R. Rep. No. 670, 81st Cong., 1st Sess. 23 (1949); S. Rep. No. 338, 81st Cong., 1st Sess. 20 (1949); S. Rep. No. 475, 81st Cong., 1st Sess. 25 (1949).

ARGUMENT

I. THE BUY INDIAN ACT EMPOWERS THE SECRETARY OF THE INTERIOR TO MAKE PREFERENTIAL PURCHASES ON THE OPEN MARKET OF ALL INDIAN PRODUCTS AND SERVICES, INCLUDING ROAD CONSTRUCTION WORK

A. Road Construction Constitutes A Product Of Indian Industry And Labor Within The Meaning Of The Buy Indian Act

It is axiomatic that "[t]he starting point in every case involving the construction of a statute is the language itself." *Southeastern Community College* v. *Davis*, No. 78-711 (June 11, 1979), slip op. 6 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring); see,

e.g., *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 7. The Buy Indian Act (the Act), 25 U.S.C. 47, broadly declares:

> So far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior.

In our view, the court of appeals erroneously concluded that road construction performed by an Indian contractor is not a "product[] of Indian industry." [10]

The Act does not limit "products" except insofar as the producer must be an "Indian industry." In the absence of a restrictive modifier, the court of appeals should have given product its "naturally broad and inclusive meaning." See *Reiter* v. *Sonotone Corp.*, No. 78-690 (June 11, 1979), slip op. 4.[11]

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[10] Of course, insofar as road construction by an Indian enterprise involves employment of Indian workers, the Honobia Road contract also falls within the Act as the employment of "Indian labor." Here, the record shows that the top management and at least some of the laborers at Indian Nations were Indians. See note 5, *supra*.

[11] For example, *Webster's Third New International Dictionary* 1810 (unabridged 1976) defines product as "something produced by physical labor * * *, the result of work, * * * the output of an industry or firm." Similarly, the *Shorter Oxford English Dictionary* 1592 (3d ed. 1966) states that a product is "[t]hat which is produced by any action, operation, or work, * * * the result." "Produce" is also broadly defined: "To bring (a thing) into existence from its raw materials or elements" (*ibid.*).

Although we are unaware of any other judicial decision construing "product" as used in the Buy Indian Act,[12] both Congress and the courts have expansively defined "product" or "produce" in other contexts. See, *e.g.*, *Parker* v. *Seaboard Coastline R.R.*, 573 F.2d 1004, 1010 (8th Cir. 1978); *Home Indemnity Co.* v. *Miller*, 399 F.2d 78, 83 (8th Cir. 1968); 29 U.S.C. 203(j); 26 U.S.C. 864(a). As the Ninth Circuit has explained (*Great Western Broadcasting Corp.* v. *NLRB*, 310 F.2d 591, 595 (1962)):

> In its broadest sense, the term "product" denotes anything which is produced. Since economic activity includes the rendition of services, it is appropriate, where the context otherwise permits, to refer to a completed service as a "product."

And a broad construction of the word "product" appears particularly warranted here, because remedial Indian legislation must "be liberally construed, doubtful expressions being resolved in favor of the Indians." *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979), slip op. 10; *Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918).

Moreover, nothing in the language of the Act supports the court of appeals' apparent notion that Congress meant to limit "products" to those goods typi-

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[12] The Comptroller General and the Department of Interior have consistently construed the term "product" as used in the Buy Indian Act to cover a multitude of activities. See, *e.g.*, Decision No. B-134031, 37 Comp. Gen. 368, 371 (1957). See generally pages 26-31, *infra*.

cally produced by Indians circa 1910.[13] The Act does not refer to "traditional Indian products" or to "products of traditional Indian industries." Rather, the Act empowers the Secretary to make open market "purchases of the products of Indian industry." The natural and reasonable reading of that language is that Congress intended to permit preferential purchases of the output of any Indian labor or Indian operation.[14] In short, the conclusion that road construction may be a "product of Indian industry" simply does not "strain" the language of the Buy Indian Act (Pet. App. 19a).

B. The Legislative History Of The Act Confirms That The Act Was Intended To Apply To Construction Work

The legislative history of the Act further refutes the court of appeals' narrow interpretation of what

[13] In fact, the legislative history and contemporaneous administrative reports demonstrate that Indians were engaged in construction at the time of the enactment of the Buy Indian Act and that Congress intended the Act to cover such endeavors. See pages 20-29, *infra*.

[14] As we discussed above (see note 5, *supra*), respondent erroneously suggests that Indian Nations is owned in part by Hubert Day, a non-Indian (Br. in Opp. 5-6); the documents attached to the government's cross-motion for summary judgment demonstrate conclusively that the sole owners and directors of Indian Nations are three Indians and that Hubert Day is the general superintendent of construction. Furthermore, Congress has expressly defined an Indian economic enterprise as a business in which "Indian ownership shall constitute not less than 51 per centum of the enterprise." 25 U.S.C. 1452(e). Under the Buy Indian regulations, the Secretary has imposed a stricter 100% Indian ownership rule. See note 3, *supra*.

constitutes a product of Indian industry.[15] The Buy Indian Act has its origins in a series of appropriations acts concerning the welfare of Indians and the funding of the Indian Department of the Department of the Interior.[16] Like most of the other Indian

[15] Of course, even if the legislative history were silent as to the intent of Congress on this point, the court of appeals unduly restricted the scope of the Act. See, *e.g.*, *United States* v. *Bornstein*, 423 U.S. 303, 310 (1976) ("But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question").

[16] For example, the Act of Apr. 30, 1908, ch. 153, 35 Stat. 71, provided (emphasis supplied):

> That no purchase of supplies for which appropriations are herein or hereinafter made for the Indian service, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in case of exigency, when, in the discretion of the Secretary of the Interior, who shall make official record of the facts constituting the exigency, and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars at any one purchase: *Provided*, That hereafter supplies may be purchased, contracts let, and labor employed for the construction of artesian wells, ditches, and other works for irrigation, not to exceed the sum of five thousand dollars in any one purchase or contract, in the discretion of the Secretary of the Interior, without advertising as hereinbefore provided: *Provided further, That as far as practicable Indian labor shall be employed and purchase in the open market made from Indians, under the direction of the Secretary of the Interior.*

As early as 1894, Congress began requiring that "purchase in open market shall as far as practicable, be made from

appropriations bills, the 1908 Indian appropriations measure set aside money for substantial construction projects, including "works for irrigation," "school buildings," and "*a wagon road on the Hoopa Valley Indian Reservation.*" Act of Apr. 30, 1908, ch. 153, 35 Stat. 71, 72, 77 (emphasis supplied). At the same time that it appropriated these monies, Congress expressly directed the Secretary of the Interior to prefer Indian labor and Indian enterprises in executing these Indian projects.[17]

The legislative materials accompanying the 1908 enactment further reflect Congress' understanding that the preference statute applied to large construction projects and that individual or collective Indian

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Indians under the direction of the Secretary of the Interior." Act of Aug. 15, 1894, ch. 290, Section 3, 28 Stat. 312. See also Act of Mar. 2, 1895, ch. 188, Section 2, 28 Stat. 907; Act of June 10, 1896, ch. 398, Section 2, 29 Stat. 348-349; Act of June 7, 1897, ch. 3, Section 2, 30 Stat. 90; Act of July 1, 1898, ch. 545, Section 2, 30 Stat. 595; Act of Mar. 1, 1899, ch. 324, Section 3, 30 Stat. 946; Act of May 31, 1900, ch. 598, Section 2, 31 Stat. 246; Act of Mar. 3, 1901, ch. 832, Section 2, 31 Stat. 1083; Act of May 27, 1902, ch. 888, Section 2, 32 Stat. 273-274; Act of Mar. 3, 1903, ch. 994, Section 2, 32 Stat. 1006; Act of Apr. 21, 1904, ch. 1402, Section 2, 33 Stat. 216; Act of Mar. 3, 1905, ch. 1479, Section 2, 33 Stat. 1077; Act of June 21, 1906, ch. 3504, 34 Stat. 326; Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015. Earlier Indian appropriations statutes contained similar language. See, *e.g.*, Act of May 15, 1886, ch. 333, Section 3, 24 Stat. 46; Act of Mar. 3, 1893, ch. 209, Section 3, 27 Stat. 639.

[17] The proviso to the relevant section of the 1908 Act, quoted above, must be read, we believe, to qualify all purchases and contracts covered by the appropriation. Indeed, the appropriation for the Hoopa Valley road itself reiterated that "the labor for said construction to be performed as far as practicable by the Indians for the reservation." *Id.* at 77.

entrepreneurs could and should be hired to build irrigation and transportation systems in Indian areas. For example, Representative Sherman explained (42 Cong. Rec. 1695 (1908)):

> It has been found advantageous to apply [a no-advertising] rule in the administration of the Indian Bureau. So far as it relates to irrigation work this provision was asked so as to make it possible to use Indian labor and Indian supplies as much as possible, so that an Indian who had a team could have his team employed, and an Indian who could not perhaps make a bid for the whole contract, could not furnish a bond, did not have the ability to undertake a work even of moderate size, might be employed, and help sustain himself by furnishing his own service, furnishing what supplies he had himself on his own allotment, and also furnish occupation for his team, farm implements, and so forth.

See also S. Rep. No. 278, 60th Cong., 1st Sess. 18-19 (1908) (Indians in Hoopa Valley Indian reservation to build road) (letter between Secretary of the Interior James R. Garfield and Senator Moses E. Clapp of the Senate Committee on Indian Affairs); 42 Cong. Rec. 1696 (1908) (remarks of Rep. Stephens); *id.* at 2426 (remarks of Sen. Clapp); *id.* at 2643 (remarks of Sen. Heyburn); *id.* at 3253, 4561, 4565, 4566-4567, 5020 (monies appropriated for road building, including Hoopa Valley Road).[18] In

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[18] The preference legislation was part of Congress' attempt to help the Indians, who had been confined to reservations

sum, at least the early versions of the Buy Indian Act were intended to encompass construction projects such as the Honobia Road, as well as more traditional Indian products.

In 1910, Congress legislated this long standing preference for Indian products into positive law. Consistent with its predecessors, the Buy Indian Act required the preferential "purchases of the products of Indian industry" and employment of "Indian labor." [19] Because the Act adopted the language of the prior appropriations statutes *in haec verba*, there is no justification for construing the Act more narrowly than its predecessors—at least in the absence of compelling indications of contrary congressional intent.

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and deprived of their usual means of support (hunting), become self-sufficient. In addition, Congress allotted parcels of land to each adult Indian on the reservations. See generally *Mattz* v. *Arnett*, 412 U.S. 481 (1973); *Halbert* v. *United States*, 283 U.S. 753 (1931); Act of Apr. 30, 1908, ch. 153, 35 Stat. 70-71.

[19] The Act was formally designated as Section 23 of the Act of June 25, 1910, ch. 431, 36 Stat. 861, which provided:

> That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, That so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed.

A history of the subsequent amendments and codifications of the Act is set forth *infra*, at pages 34-36.

See *Oscar Mayer & Co.* v. *Evans*, No. 78-275 (May 21, 1979), slip op. 4; *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *Northcross* v. *Board of Education*, 412 U.S. 427, 428 (1973); *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 450 (1948). See also *St. Paul Fire & Marine Insurance Co.* v. *Barry*, 438 U.S. 531, 545-546 (1978) ("[A]s Mr. Justice Cardozo observed, words or phrases in a statute come 'freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. In such conditions history is a teacher that is not to be ignored.' *Duparquet Co.* v. *Evans*, 297 U.S. 216, 221 (1936)").

Further support for the conclusion that Congress intended the Act to apply to a broad range of Indian endeavors is found in the contemporaneous legislative history. Other sections of the Act itself specifically provided that the Secretary of the Interior would continue to supervise major construction projects in Indian areas, such as the building of irrigation works. See Act of June 25, 1910, ch. 431, Sections 13, 17, 36 Stat. 858, 860; H.R. Rep. No. 1135, 61st Cong., 2d Sess. 5-6 (1910). And the pertinent legislative debates, though somewhat sparse, make clear that those projects would remain subject to an Indian preference law, now codified in the Buy Indian Act. As Representative Burke explained (45 Cong. Rec. 6097 (1910)):

> The legislation proposed will give the Indian service all the relief from a strict compliance with the general [advertising] law * * * that is

> necessary in the interest of good administration. There is no reason why Indian service contracts for either supplies or irrigation systems should not conform to the law applicable to all other branches of the public service except in so far as the proviso in the proposed legislation affects the purchases of products of Indian industry and the employment of Indian labor.

See also H.R. Rep. No. 1135, *supra*, at 12; 45 Cong. Rec. 8900, 8981 (1910).[20]

C. The Court Of Appeals Should Have Deferred To The Well-Established Administrative Construction Of The Act

The court of appeals' narrow reading of the Act is also inconsistent with the well-settled rule that "'* * * the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.'" *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); see, *e.g.*, *United States* v. *Rutherford*, No. 78-605 (June 18, 1979), slip op. 8; *Board of Governors* v. *First Lincolnwood Corp.*, 439 U.S. 234, 248 (1978).[21] In light of the

[20] The 1910 enactment did represent a change from the past insofar as Congress eliminated other exceptions from the general advertising requirements (such as the $500 exemption) that had frequently appeared in the earlier appropriations bills. See 45 Cong. Rec. 6097 (1910).

[21] There is thus no basis for the court of appeals' suggestion that "if the Government's administrative interpretation is entitled to the deference urged, the Congress is the branch before whom the point should be pressed" (Pet. App. 16a).

language and legislative history of the Act canvassed above, it cannot be gainsaid that the Secretary's broad interpretation of the Act is, at a minimum, a reasonable one. Moreover, as we now demonstrate, the courts below erroneously concluded (Pet. App. 12a, 46a) that the administrative construction was neither contemporaneous nor of longstanding.

We earlier observed that the current Buy Indian Act is derived from a series of Indian appropriations measures between 1886 and 1908. See pages 20-22, & note 16, *supra*. The annual reports that the Department of the Interior was required to submit to Congress in those years evidence a consistent administrative understanding that the Indian preference legislation applied to major (Indian-related) construction projects. For example, the *Annual Report of the Secretary of the Interior* 19-20 (1907), reprinted in I *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1907*, noted that "[s]pecial effort has been made by the Indian Office to find employment for the Indians" and that in particular "[t]he reclamation work has * * * given the opportunity for the employment of a large number of Indians in the construction of the ditches and reservoirs." Similarly, the *Annual Report of the Commissioner of Indian Affairs* 57-58 (1908), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1908*, points out that government-paid "Indian teams and labor" were responsible for much of the construction of various irrigation

projects.[22] See also *Annual Report of the Secretary of the Interior* 24 (1909), reprinted in I *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909*; *Annual Report of the Commissioner of Indian Affairs* 6-7 (1909), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1909*.

The passage of the Buy Indian Act in 1910 did not interrupt the consistent administrative practice regarding the preferential use of Indian labor and Indian teams on major construction projects. To the contrary, the Commissioner of Indian Affairs reported in 1910 that "[a] large number of Indians [and their teams] have been employed, as usual, on irrigation works, railway construction, and other projects." *Annual Report of the Commissioner of Indian Affairs* 8 (1910), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1910;* see *id.* at 8-9, 22-24; *Annual Report of the Secretary of the Interior* 41 (1911) ("In constructing irrigation works, care is taken to employ Indian labor as much as is possible"), reprinted in I *Reports of the Department of the Interior*

[22] The Commissioner acknowledged that he had been unable to hire Indians to perform the construction work on one of the reservations:

> The work of constructing the several systems of irrigation on the former Uintah Reservation in Utah has been carried forward during the year at an expense of $149,006.29. Of this sum, I regret to say, only $3,356.48 was paid for Indian labor, as it was almost impossible to induce the Ute Indians to work on canal construction.

for the Fiscal Year Ended June 30, 1911; *Annual Report of the Commissioner of Indian Affairs* 14-15, 31 (1911), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1911*. In fact, in 1911, which was the first full year in which the Buy Indian Act was operative, the Commissioner told Congress that he had used Indians "wherever practicable" in "the construction of roads, trails, and telephone lines" in Indian forestry areas. *Id.* at 17.[23]

In short, the early administrative history of the Act reveals that the Office of Indian Affairs (now BIA) hired, as far as was practicable, both Indian laborers and Indian entrepreneurs who owned teams to execute major construction projects. The first administrators of the Act applied it to construction work, including road building. That application was consistent with their view that the phrase "Indian industry" referred to a wide variety of activities performed by Indians, including "farming" and "ordinary industrial activities." [*1911*] *Annual Report of the Secretary of the Interior*, *supra*, at 38-39; see, *e.g.*, *Annual Report of the Commissioner of Indian Affairs* 25-36 (1912), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1912*; *Annual Report of the Commissioner of Indian Affairs* 28 (1911), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1911*.

[23] The Honobia Road project is, of course, a logging road in an Indian area.

To be sure, the initial administrative reports do not speak of corporate contracting firms owned by Indians. But, in light of the economic and political circumstances [24] of the Indians at the turn of this century, it is hardly surprising that they had not yet established corporate structures. Moreover, the contemporaneous reports specifically anticipated that the Indians would gradually develop construction businesses and various other industries. See, *e.g.*, [*1911*] *Annual Report of the Secretary, supra*, at 38-39; [*1910*] *Annual Report of the Commissioner, supra*, at 19; *Annual Report of the Secretary of the Interior* 52-53 (1912), reprinted in I *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1912.* And more recently, when Indians have in fact formed construction companies and other industrial corporations, the BIA has consistently concluded that the products of these corporations are entitled to a preference under the Act. See, *e.g.*, Opinion of the Solicitor of the Department of the Interior 5-7 (Apr. 27, 1971); *Department of the Interior and Related Agencies Appropriations for Fiscal Year 1970: Hearings on H.R. 12781 Before a Subcomm. of the Senate Comm. on Appropriations*, 91st Cong., 1st Sess., Part 1, 166, 190-194 (1969) (statement of Commissioner of Indian Affairs) ("small road construction projects," and other construction

[24] Indians were not generally entitled to citizenship until 1924. See Act of June 2, 1924, ch. 233, 43 Stat. 253.

work subject to Buy Indian Act).[25] See also Decision No. B-134031, 37 Comp. Gen. 368, 371 (1957) (Indian-owned coal mine is an industry subject to Buy Indian Act); Decision No. B-169669, 50 Comp. Gen. 94 (1970); Decision No. B-187082, 56 Comp. Gen. 178, 179-180 (1976).

D. The Buy Indian Act Should Be Liberally Construed To Effectuate The Strong Congressional Policy Favoring Indian Industry And Employment

Like other remedial statutes enacted on behalf of the Indians,[26] the Buy Indian Act is an expression of the special relationship between the federal government and the Indians, "who are the wards of the nation, dependent upon its protection and good faith." *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930). See *Squire* v. *Capoeman*, 351 U.S. 1, 6-7 (1956). Although Congress has from time to time adopted different philosophies regarding this relationship,[27] it has

[25] In light of Congress' awareness of this administrative construction, and the legislative approval implicit in Congress' repeated funding of the BIA road construction program, the administrative interpretation is entitled to particular deference. See, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974).

[26] See generally *Morton* v. *Mancari*, 417 U.S. 535, 538 n.2, 541 n.8 (1974). See also Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.*

[27] Cf. *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 71-72 (1962). At the time that the Buy Indian Act was passed, Congress was determined to break down the tribal patterns and to "civilize" the Indian people. See 28 Cong. Rec. 2026

consistently attempted to foster the development of Indian economic enterprises. See 25 U.S.C. 13; Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450e; Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.* In particular, Congress has repeatedly recognized that protective legislation and special federal assistance is required to ensure the existence of significant Indian industry. See, *e.g.*, 25 U.S.C. 450e(b); 25 U.S.C. 1451; Act of Mar. 1, 1926, ch. 41, 44 Stat. 135-136; H.R. Rep. No. 93-907, 93d Cong., 2d Sess. 1-2 (1974); 42 Cong. Rec. 1418, 1694, 1706-1707 (1908).

It is therefore apparent that the cramped construction of the court of appeals is at odds with the congressional policies that underlie the Act. The court's restrictive view of what constitutes a "product[] of Indian industry" frustrates the protective purpose of the Act, because a preference is most critical in competitive markets such as the construction industry.[28] As Judge McKay observed in dissent (Pet. App. 27a), the "[majority] opinion threatens to relegate [the Act] to a role of protecting Indian handicraft and trinket production—economic activi-

(1896); 42 Cong. Rec. 1418, 1694, 1706-1707 (1908). More recently, Congress has recognized the importance of preserving Indian self-government and the tribal unit. See, *e.g.*, Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450 *et seq.*

[28] Of course, limiting certain procurement decisions to qualified Indian firms will not eliminate competition altogether since in many instances there will be several Indian bidders.

ties that probably require no preferential treatment at all."

The adverse impact of the decision below on Indian industries is not theoretical. We are informed that, as a result of this decision, BIA road construction contracts awarded to Indian firms dropped from approximately $11 million in 1977 to $2.3 million in 1978, even though total BIA road construction increased from $36.7 million to $44.6 million in that same time period.[29] In addition, there have been several bankruptcies among Indian construction firms and a concomitant drop in Indian employment in the construction field has apparently followed.

II. THE BUY INDIAN ACT PERMITS PREFERENTIAL PURCHASES OF THE PRODUCTS OF INDIAN INDUSTRY WITHOUT PUBLIC ADVERTISING

The courts below also held (Pet. App. 6a, 46a) that, even if applicable to road construction, the Buy Indian Act does not authorize the Secretary of Interior and his delegates to negotiate with Indian firms without complying with the public advertising requirements of the Federal Property and Administrative Services Act (FPASA), as amended in 1965, 41 U.S.C. 251 *et seq.* We answer that Congress intended the Buy Indian Act to be an exception to

[29] Even the $2.3 million figure may be misleading because only $269,353 of that amount was awarded to Indian firms after competitive, advertised bidding open to the public. All figures represented are derived from BIA financial year data.

general advertising requirements. Indeed, before 1965, there is little question that the Secretary could negotiate purchases of Indian products without advertising. And, as the language and legislative history of the FPASA make clear, Congress did not impliedly repeal this long standing advertising exemption when it extended the FPASA to cover all agencies, including the BIA, in 1965.

A. Prior To 1965, Buy Indian Contracts Were Not Subject To General Advertising Requirements

1. When the Buy Indian Act was enacted in 1910, the only federal statute generally requiring public advertising for governmental procurement was Section 3709 of the Revised Statutes.[30] That Congress intended to except purchases of Indian products from the strictures of Section 3709 is "patent from the text" of the Act. H.R. Rep. No. 1135, 61st Cong., 2d Sess. 12 (1910). The original version of the Act

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[30] See Act of Mar. 2, 1861, ch. 84, Section 10, 12 Stat. 220. Section 3709 of the Revised Statutes provided:

> All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

unambiguously established that the Indian Service (BIA's predecessor) was generally subject to Section 3709, except for the Secretary's "purchases of the products of Indian industry * * * in open market." Act of June 25, 1910, ch. 431, Section 23, 36 Stat. 861. See note 19, *supra*. Indeed, we do not understand respondent to contend otherwise.

In any event, the legislative history of the Act forecloses any argument on this point. The pertinent House Report states that "[w]ith the exceptions noted in the proviso [*i.e.*, purchases of Indian products and employment of Indian labor], [the Act] will bring the Indian Service, like all other branches of the public service, under the provisions of section 3709 of the Revised Statutes." H.R. Rep. No. 1135, *supra*, at 12. In addition, the legislative debates accompanying both the Act and its predecessors (see pages 20-26, *supra*) show that the phrase "purchases * * * in open market" refers to unadvertised, negotiated purchases. For example, Congressman Sherman explained that at times "it was necessary to go into the open market rather than wait for advertising." 42 Cong. Reg. 1695 (1908). See *id.* at 1696 (remarks of Rep. Mann); 45 Cong. Rec. 6097 (1910) (remarks of Rep. Burke).

2. The subsequent amendments and codifications of the Buy Indian Act and Section 3709 of the Revised Statutes have not affected their interrelationship. Although the 1918 edition of the Compiled Statutes of the United States showed the Buy Indian

Act as essentially unchanged,[31] the first and second sentences of the Act appeared in two separate sections in the 1926 edition of the United States Code. That is, BIA's general duty to adhere to Section 3709 advertising requirements (now found in 41 U.S.C. 5) was codified in 25 U.S.C. 93 and the proviso regarding Indian goods was placed in 25 U.S.C. 47. No explanation appears for this apparently arbitrary decision of the codifiers, and, of course, this division of the Buy Indian Act did not affect the meaning or application of the statute since Congress did not enact this codification. See Act of June 30, 1926, ch. 712, Section 2, 44 Stat. 777 (printed in 44 Stat. (Vol. I) 1).[32]

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[31] U.S. Comp. Stat. (1918), Sections 6835, 6835a. The Act had been amended in 1916 to permit unadvertised purchases of non-Indian products for up to $50. Act of May 18, 1916, ch. 125, 39 Stat. 126. This $50 exemption was increased to $100 in 1928. Act of Jan. 12, 1927, ch. 27, 44 Stat. 936.

[32] In 1940, Congress consolidated various exceptions to the general advertising requirements into Title 41 of the United States Code and concomitantly eliminated the now redundant sections scattered throughout the Code. See Act of Oct. 10, 1940, ch. 851, 54 Stat. 1109-1114, codified at 41 U.S.C. (1946 ed.) 6, 6a, repealed Act of Oct. 31, 1951, ch. 654, Section 1 (107), 65 Stat. 705. Among those sections was 25 U.S.C. 93, which was repealed and replaced by 41 U.S.C. (1946 ed.) 6a(g). See Act of Oct. 10, 1940, ch. 851, 54 Stat. 1110, 1112. The Buy Indian Act itself (25 U.S.C. 47) was unaffected by these changes (see 54 Stat. 1112). Indeed, the 1940 enactment as a whole made "no changes in existing law." H.R. Rep. No. 2647, 76th Cong., 3d Sess. 1 (1940). See *id.* at 2 ("Only changes in form have been made"); S. Rep. No. 2135, 76th Cong., 3d Sess. 1 (1940).

The 1940 legislation does confirm, however, that purchases "in open markets" refers to unadvertised procurement. See, *e.g.*, 41 U.S.C. (1946 ed.) 6a(g) (Department of the Interior purchases of less than $100).

Similarly, none of the several congressional amendments of Section 3709 of the Revised Statutes (41 U.S.C. 5) since 1910 have abrogated the exception for Indian products set forth in the Buy Indian Act. Thus, although Section 3709 was substantially rewritten in 1946, the new version nonetheless states that the general advertising requirements did not apply where "otherwise provided [by] * * * other law." Act of Aug. 2, 1946, ch. 744, Section 9, 60 Stat. 809.[33]

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[33] 41 U.S.C. (1946 ed.) 5 provided in relevant part:

> Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $100, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis. * * *

The statute remains essentially unchanged, except that the $100 exemption has been periodically increased. See Act of June 30, 1949, ch. 288, Section 502(e), 63 Stat. 403 ($500); Pub. L. No. 85-800, Section 7, 72 Stat. 967 ($2,500). The exemption for small purchases is currently $10,000. See Pub. L. No. 93-356, Section 1, 88 Stat. 390.

Furthermore, the legislative reports accompanying the 1946 enactment point out that the rewritten version only codifies, clarifies, and perfects "existing law." See S. Rep. No. 1636, 79th Cong., 2d Sess. 6-7 (1946); H.R. Rep. No. 2186, 79th Cong., 2d Sess. 6-7 (1946).

Accordingly, it is beyond dispute that 41 U.S.C. 5 does not bar the negotiation of contracts pursuant to the Buy Indian Act.[34] See also *Morton* v. *Mancari*, 417 U.S. 535, 541-551 (1974) (enactment of Title VII did not impliedly repeal long standing Indian preference statutes). The only issue remaining then is whether the Buy Indian Act also exempts Indian contracts from the Federal Property and Administrative Services Act of 1949, 41 U.S.C. 251 *et seq.*, after the amendment of the latter statute in 1965. We now turn to address this issue.

B. The Federal Property And Administrative Services Act Of 1949, As Amended, Did Not Abrogate The Secretary's Power To Negotiate Contracts With Indian Firms Under The Buy Indian Act

1. *Introduction.* The courts below concluded that the Federal Property and Administrative Services Act of 1949, as amended (FPASA), 41 U.S.C. 251 *et seq.*, mandates that the Secretary of the Interior publicly advertise all BIA road construction contracts notwithstanding the Buy Indian Act. The FPASA did not expressly repeal the Buy Indian Act. In fact, as originally enacted, the advertising requirements of the FPASA applied only to the General

[34] Neither court below suggested otherwise.

Services Administration and those agencies which voluntarily chose to follow GSA procurement regulations. See Federal Property and Administrative Services Act of 1949, ch. 288, Section 302(a), 63 Stat. 393; H.R. Rep. No. 670, 81st Cong., 1st Sess. 20-21 (1949); S. Rep. No. 274, 89th Cong., 1st Sess. 1 (1965); H.R. Rep. No. 1166, 89th Cong., 1st Sess. 6 (1965).[35] And, although the FPASA was amended in 1965 to cover federal agencies generally (41 U.S.C. 252(a),[36] nothing in the Act as amended refers directly to BIA procurement or explicitly abrogates or limits the Buy Indian Act.

Thus, if the FPASA has repealed the Buy Indian Act, it has done so impliedly. But, in *Morton* v. *Mancari*, *supra*, this Court made clear that a statute of general application does not constitute an implied repealer of a longstanding Indian preference statute, including the Buy Indian Act, unless there is an affirmative showing of a congressional intent to repeal. 417 U.S. at 549-551. See also *Livingston* v. *Ewing*, 601 F.2d 1110 (10th Cir. 1979).[37] Here, how-

[35] The primary purpose of the original FPASA was the creation of the GSA as a means of controlling and centralizing much government procurement and also managing government supplies. See H.R. Rep. No. 670, *supra*, at 2, 7. Title III of the FPASA contained a detailed advertising statute based upon the Armed Services Procurement Act of 1947, ch. 65, 62 Stat. 21, and intended as a modernized substitute for 41 U.S.C. 5. See H.R. Rep. No. 670, *supra*, at 6, 20-21; S. Rep. No. 274, *supra*, at 1; S. Rep. No. 338, 81st Cong., 1st Sess. 23 (1949).

[36] See Pub. L. No. 89-343, 79 Stat. 1303; S. Rep. No. 274, *supra*, at 1; H.R. Rep. No. 1166, *supra*, at 1-2.

[37] In *Morton* v. *Mancari*, the Court considered whether the Equal Employment Opportunity Act of 1972, 42 U.S.C. 2000e-

ever, neither respondent nor the lower courts have pointed to any hint that Congress intended to abrogate a century-old policy of Indian preferences. Indeed, as we now demonstrate, the language and legislative history of the FPASA overwhelmingly show that Congress meant to preserve existing exemptions to the general advertising laws such as the Buy Indian Act.

2. *The advertising requirements of the FPASA do not govern Buy Indian contracts.* When it extended the scope of the FPASA in 1965 to cover all government agencies, Congress purposefully preserved existing exceptions to the general advertising law. Section 302(c) of the FPASA, 41 U.S.C. 252(c), enumerates 15 exceptions to the advertising requirements, including an exemption "otherwise authorized by law." 41 U.S.C. 252(c)(15) ("exemption 15"). In addition, Section 310 of the Act, as amended by Section 5 of the 1965 amendment, unambiguously establishes that any law that constitutes an exception to Section 3709 of the Revised Statutes (41 U.S.C. 5) also qualifies as an exception to the FPASA under exemption 15 (Pub. L. No. 89-343, Section 5, 79 Stat. 1303, 41 U.S.C. 260):

16(a), which extended Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to government employment, repealed a preference for Indian employment within the BIA. Although the Court there addressed Section 12 of the Indian Reorganization Act, 25 U.S.C. 472, it specifically noted that the same result would have obtained with regard to the Buy Indian Act itself. See 417 U.S. at 538 n.2 & 541 n.8.

> Any provision of law which authorizes an executive agency * * * to procure any property or services without advertising or without regard to said section 3709 shall be construed to authorize the procurement of such property or services pursuant to section 302(c)(15) of this Act [41 U.S.C. 252(c)(15)] without regard to the advertising requirements of section 302(c) and 303 [41 U.S.C. 253] of this Act.[38]

Likewise, the Committee Reports confirm that "exemptions from the requirements of Revised Statutes, section 3709 * * * are preserved [under the FPASA] as exceptions from the advertising requirements of sections 302(c) (and 303) of the act pursuant to section 302(c)(15)." H.R. Rep. No. 1166, *supra*, at 8; S. Rep. No. 274, *supra*, at 5.[39] It is thus apparent that the Buy Indian Act, which both constitutes an exception to Section 3709 of the Revised Statutes and also

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[38] Current Section 310 derives from Section 1(n) of the Act of July 12, 1952, ch. 703, 66 Stat. 594, 41 U.S.C. (1964 ed.) 260(b). The earlier version, which was enacted in 1952, also set forth "in effect, that when section 3709 is inapplicable to a certain type of contract, section 302(c) shall likewise be inapplicable to that type of contract." H.R. Rep. No. 1524, 82d Cong., 2d Sess. 11 (1952).

[39] Exemption 15 appeared in the original FPASA as exemption 14. See 63 Stat. 393-394. The legislative reports reflect with clarity Congress' intent to "preserve the authority to negotiate contracts conferred by other permanent legislation." S. Rep. No. 338, 81st Cong., 1st Sess. 20 (1949). See *id.* at 5; S. Rep. No. 475, 81st Cong., 1st Sess. 5, 23-24 (1949); H.R. Rep. No. 670, *supra*, at 23. See also S. Rep. No. 571, 80th Cong., 1st Sess. 14-15 (1947) (discussing similar provision in Armed Services Procurement Act of 1947).

authorizes unadvertised procurement in the open market (see pages 34-35, *supra*), falls within the plain terms of exemption 15.[40]

Although the courts below apparently recognized that the Buy Indian Act was preserved by exemption 15 of the FPASA (Pet. App. 7a, 40a), they nonetheless held that Section 302(e)(B) of the FPASA requires the BIA to advertise road construction contracts. Section 302(e)(B) provides that "[t]his section shall not be construed to * * * permit any contract for the construction or repair of * * * roads * * * to be negotiated without advertising as required by section 253 of this title, * * * unless negotiation of such contract is authorized by the provisions of

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[40] In our view, the Buy Indian Act is also excepted from the FPASA pursuant to Section 302(a)(2) of the FPASA. That statute provides that the FPASA does not apply "when [it] is made inapplicable pursuant to * * * any other law." 41 U.S.C. 252(a)(2). The relevant discussion in the legislative reports regarding Section 302(a)(2), states that "the limited exemptions [from advertised contracting] specified * * * in any other law, are not eliminated by this section," and that an agency may "negotiate contracts [without] formally advertis[ing] * * * to the extent that it has negotiating authority under other law." H.R. Rep. No. 1166, *supra*, at 7; S. Rep. No. 274, *supra*, at 4. See *id.* at 2. The legislative history does not illuminate the distinction between Sections 302(a)(2) and 302(c)(15), but a law qualifying under the former is exempted from the entire FPASA whereas the latter constitutes an exemption as to the advertising requirements (41 U.S.C. 253) and not the negotiated contract requirements (41 U.S.C. 254) of the FPASA.

The Court need not resolve this distinction unless it disagrees with our submission regarding the interaction of exemption 15 and Section 302(e), 41 U.S.C. 252(e). See pages 42-46, *infra*.

paragraphs (1), (2), (3), (10), (11), (12), or (14) of subsection (c) of this section." 41 U.S.C. 252(e)(B). The district court reasoned (Pet. App. 40a-41a), and the court of appeals agreed (*id.* at 7a-8a), that the Buy Indian Act does not authorize the negotiation of major construction contracts such as the Honobia Road contract because exemption 15 is not included among the specific exemptions set forth in Section 302(e)(B). We disagree.

Section 302(e)(B) does not state that a major construction project such as road building may be awarded without public advertising only if negotiation is authorized by exemptions 1-3, 10-12, or 14. Rather it says that, with certain exemptions, "[*t*]*his section* shall not be construed to * * * permit [the negotiation of various construction contracts]." 41 U.S.C. 252(e)(B) (emphasis supplied). In other words, if the Secretary of the Interior seeks to let a road contract without advertised bidding based solely on the FPASA (*i.e.*, "this section"), then the contract must qualify under one of the seven exemptions enumerated in Section 302(e)(B).[41] But where, as

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[41] The court of appeals incorrectly stated (Pet. App. 3a-4a) that the government did not rely on any of the other enumerated exceptions found in Section 302(c). To the contrary, we urged (Ct. App. Br. 6-7) the court to consider whether negotiation of the Honobia Road contract was authorized as a matter of impracticability under 41 U.S.C. 252(c)(10), as well as under the Buy Indian Act. See *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, 477 F.2d 696 (5th Cir. 1973), cert. denied, 415 U.S. 914 (1974) (Small Business Administration purchase of products of minority industry renders advertising impracticable as a matter of law); H.R. Rep. No. 670, *supra*,

here, the Secretary relies on another statutory source of authority (the Buy Indian Act), then Section 302 of the Act does not "authorize" or "permit" the transaction, and Section 302(e)(B) simply does not control. See also note 40, *supra*.

This distinction between exemption 15 and the other exemptions is drawn by the statute itself. Section 304 of the FPASA governs the form and content of "[e]very contract negotiated pursuant to section [302(c), 41 U.S.C.] 252(c)." 41 U.S.C. 254(a). If a contract negotiated pursuant to the Buy Indian Act was authorized or permitted by Section 302(c)(15), then such a contract would be a "contract negotiated pursuant to section [302(c)]" within the scope of Section 304. Congress recognized, however, that Section 302(c)(15) does not authorize or permit Buy Indian contracts. Indeed, that is why, in 1965, Congress specifically amended exemption 15 to subject Buy Indian purchases and like procurement to the requirements of Section 254. Pub. L. No. 89-343, Section 2, 79 Stat. 1303; see S. Rep. No. 274, *supra*, at 4 ("The effect of this addition would be to make the restrictions of section 304, which are applicable

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at 22 (exemption to be construed liberally); S. Rep. No. 571, 80th Cong., 1st Sess. 8 (1947). Furthermore, since the Court granted certiorari in this case, the Commissioner of Indian Affairs has issued a determination and finding that public advertising is impracticable given the goals and purposes of the BIA. See App. C, *infra*, 8a-10a. Accordingly, if the Court rejects our submissions in points I or II, it should remand this case to the court of appeals for consideration of Exemption 10 and the new BIA regulation.

to contracts negotiated under paragraphs (1) to (14) of section 302(c)[,] similarly applicable to contracts negotiated under paragraph (15)"); H.R. Rep. No. 1166, *supra*, at 7; 111 Cong. Rec. 12684 (1965).

The legislative history also undermines the court of appeals' construction of Section 302(e)(B). That statute was enacted in 1949 as part of the original FPASA. In the course of legislation, Congress repeatedly explained that Section 302(e)(B) had a significantly more circumscribed purpose than that ascribed to it by the courts below:

> For clarity this subsection [e] provides that section 302 does not authorize or change the existing requirements for authorization for the erection or repair of buildings, roads, sidewalks, or similar items.

H.R. Rep. No. 670, *supra*, at 23; S. Rep. No. 338, *supra*, at 20; S. Rep. No. 475, *supra*, at 25.

We further submit that the court of appeals' view of the FPASA in general and Section 302(e)(B) in particular is flatly inconsistent with the numerous congressional statements regarding the preservation of existing exceptions to the general advertising laws, such as the Buy Indian Act. See pages 41-42, *supra*.

In sum, here, as in *Morton* v. *Mancari*, there is no indication that Congress sought to limit or repeal the Buy Indian Act when it extended the FPASA in 1965. Three different sections of the FPASA and the legislative history confirm that Congress intended to preserve provisions such as the Buy Indian Act.

See 41 U.S.C. 252(a)(2), 252(c)(15), 260; pages 38-45, *supra*. In addition, here, as in *Morton* v. *Mancari*, the longstanding and specific Indian preference statute is readily harmonized with a newer law of general application. See 417 U.S. at 550-551; see also *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961). Congress has repeatedly placed its imprimatur on Indian preference legislation,[42] and the FPASA itself declares that it is the "policy of the Congress that a fair proportion of the total purchases and contracts for property and services for the Government shall be placed with small business concerns." 41 U.S.C. 252(b). Accordingly here, as in *Morton* v. *Mancari*, "[t]he courts are not at liberty to pick and choose among congressional enactments, * * * [but must] regard each as effective." 417 U.S. at 551.[43]

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[42] See pages 31-32, & note 16, *supra*. In particular, we note that Section 7(b) of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. 450e(b), which was, of course, enacted after the FPASA, incorporates the preference policy of the Buy Indian Act. See also 41 C.F.R. 14H-70.000 *et seq.*; 44 Fed. Reg. 62510-62515 (1979) (regulations to be codified in 41 C.F.R. 14-1.354, 14-7.5002 to 14-7.5003); H.R. Rep. No. 93-1600, 93d Cong., 2d Sess. 15, 21 (1974). Congress thus does not view the policies inherent in the Buy Indian Act and the FPASA as incompatible. Cf. *Morton* v. *Mancari*, *supra*, 417 U.S. at 548-549.

[43] In light of the decision in *Morton* v. *Mancari*, respondent's constitutional claims are also without merit. See 417 U.S. at 551-555. See also *Livingston* v *.Ewing*, *supra*, 601 F.2d at 1115-1116.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1980

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

Civil Action No. 77-178-C

GLOVER CONSTRUCTION COMPANY, A CORPORATION, PLAINTIFF

v.

CECIL ANDRUS, SECRETARY OF THE INTERIOR, *et al.*,

RELEVANT DOCKET ENTRIES

06/06/77 *Complaint*

09/07/77 ANSWER of the Defendants

10/26/77 Deposition of ALTON R. MORDWALL taken on behalf of plaintiff

10/26/77 Deposition of MAYNARD E. WING taken on behalf of plaintiff

10/26/77 Deposition of A. E. GREEN taken on behalf of plaintiff

10/26/77 Deposition of THOMAS E. DONAHOE, JR. taken on behalf of the plaintiff

11/01/77 MOTION for Pltf. For Leave of Court to Amend Complaint

11/03/77 ORDER granting plaintiff's Motion to Amend Petition [Sic]. (JWM) (copies counsel)

111/03/77 AMENDED COMPLAINT

11/09/77 Motion for Summary Judgment, by plaintiff

12/07/77 Motion of defendants, for Summary Judgment

01/29/78 ORDER GRANTING MOTION FOR SUMMARY JUDGMENT in favor of plaintiff and against defendants.

Defendants' cross-motion for summary judgment is denied. Pltf. & defts. directed to file within 10 days from the date of this order a joint status report indicating whether road construction work has been commenced pursuant to contract between defts and Indian Nations Construction Co . . . If parties cannot agree on join status report, each side will file such report. Further, pltf. directed to file within 10 days from the date of this order a brief setting forth the appropriate relief to be granted by way of final judgment in accordance wtih the views expressed in this order, etc. Defts. will have 10 days thereafter to file Response brief. (JWM) (Copies to counsel)

05/12/79 ORDER that road construction contract entered into between defts. and Indian Nations null and void. Pltfs. request that court order defts. to advertise the unperformed balance of road construction contract is denied. Pltfs. request for costs not properly before Court and shall file with court clerk within time limits. Pltfs. request for attorneys fees is denied. (JWM) (Copies to counsel)

05/12/79 FINAL JUDGMENT: In conformity with court's orders entered on 3/29/78 and on this date, it is adjudged (1) that the road construction contract entered into between defts. and Indian Nations Construction Co. is null and void. (2) that no refund is to be made of any sums heretofore paid under the contract to Indian Nations Construction Co.; (3) that defts. are permanently enjoined from circumventing the advertising requirements of 41 U.S.C., Sec. 253 in connection with future road construction contracts. (JWM) (Copies to counsel)

06/05/78 MOTION of defts. for Stay of Final Judgment pending appeal

06/05/78 NOTICE OF APPEAL

06/28/78 ORDER the Court concludes that a stay should not be granted pending an appeal to the court of appeals for the Tenth Circuit. The Court nonetheless does hereby stay the judgment for a period of 30 days so as to give the defendants an opportunity to secure a stay order from the court of appeals (JWM) (Copies to counsel)

No. 78-1554

GLOVER CONSTRUCTION COMPANY,
PLAINTIFF-APPELLEE

v.

CECIL ANDRUS, SECRETARY OF THE DEPARTMENT OF THE INTERIOR, *et al.*,

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RELEVANT DOCKET ENTRIES

07/18/78 Cause docketed; Record on Appeal, Vol. I (pleadings) (63++pp), orig. 63+++pp. Docketing statement; orig. & 9 cc

07/20/78 Appellant's Motion for Stay Pending Appeal, orig. & 3 cc to panel

08/14/78 Order—appellants' mot for stay pending appeal is granted. Judge Barrett voted to deny stay. It is further ordered that case be accelerated for hearing during Sept. term in Salt Lake City. Appellee's brief to be filed on or before 8/31/78. Reply brief, if any, to be filed on or before 9/15/78. Parties shall be notified at a later date of day & hour of argument—Barrett, McKay, Logan

08/15/78 Order—Upon the Court's own motion, the captioned case is set for oral argument and submission to the Court in Division II on Wednesday, September 27, 1978, at 9:30 a.m., in Salt Lake City, Utah. (Seth)

01/11/79 OPN.F—published, signed opinion filed by McWilliams, Barett, McKay Writing judge is Barett; Judge McKay dissents

JM.DIS—judgment affirmed by published signed opinion —McWilliams, Barrett, McKay

01/24/79 M.EXTM.F.P.REHRG.F—appellant's motion for extension of time to file petition for rehearing to 2/26/79 filed—4 copies, c/s

M.EXTM.F.P.REHRG.SUB.—appellant's motion for extension of time to file petiiton for rehearing submitted to panel

01/31/79 M.EXTM.F.P.REHRG.DISP—Order granting appellant's motion for extension of time to file petition for rehearing to 2/26/79—Disp. by McWilliams, Barrett, McKay

ISS.CC.O.—Issued certified copy of order granting extension of time to file petition for rehearing to parties

02/02/79 M.STAY.ISS.MDT.F.—appellant's motion to stay issuance of mandate pending application for—certiorari filed—4 copies—c/s

02/05/79 M.STAY.ISS.MDT.SUBM.—appellant's motion to stay issuance of mandate submitted to panel

02/23/79 M.EXTM.F.P.REHRG.F.—Appellant's motion for extension of time to 3/2/79 to file petition for rehearing filed, 4 copies, c/s

M.EXTM.F.P.REHRG.SUBM.—Appellant's motion for extension of time to 3/2/79 to file petition for rehearing submitted to panel

03/01/79 M.EXTM.F.P.REHRG.DIS.—order granting appellant's motion for extension of time to 3/2/79 to file petition for rehearing—McWilliams, Barrett, McKay

03/02/79 P.RHRG.F.—appellant's petition for rehearing filed—10 copies—c/s

P.RHRG.SUBM.—appellant's petition for rehearing submitted to panel

03/12/79 P.REHRG.DISP.—Order: Appellant's petition for rehearing ordered filed as of 3/2/79. Petition for rehearing is denied on the merits. Judge McKay voted to grant rehearing—Disp. by McWilliams, Barrett, McKay

ISS.CC.O.—Issued certified copy of order denying petition for rehearing tc parties

04/03/79 M.STAY.ISS.MDT,DISP.—order granting stay of mandate until 5/3/79—McWilliams, Barrett, McKay

05/10/79 M.STAY.ISS.MDT,DISP.—Order granting stay of mandate to 6/11/79

06/19/79 M.STAY.ISS.MDT,DISP.—Order granting stay of mandate to 7/10/79

APPENDIX B

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20245

[SEAL]

In Reply Refer To 20 BIAM Bulletin 1

Memorandum Mar. 3, 1976

To : Holders of 20 BIAM

From : Commissioner of Indian Affairs

Subject: Buy Indian Act Contracting

Regulations that implement the Indian Self-Determination and Education Assistance Act (Public Law 93-638, 88 Stat. 2203) and set forth the requirements that must be followed in contracting with Indian tribes and tribal organizations for the operation of Bureau programs that serve them were published beginning on page 51282 of the November 4, 1975, Federal Register (40 FR 51282). Although contracts for such programs may only be entered into in accordance with the "Self-Determination" regulations, these regulations do not prevent the Bureau from using the "Buy Indian Act" (25 USC 47) for other purposes. Therefore, the purpose of this Bulletin is to briefly state the Bureau's policy on the use of the "Buy Indian Act", pending publication of regulations dealing therewith in the Bureau's Procurement Regulations (41 CFR 14H).

It is the Bureau's policy that all purchases or contracts be made or entered into with qualified Indian

contractors to the maximum practicable extent. Before taking any procurement action, contracting officers shall first determine if there are any qualified Indian contractors within the normal competitive area that can fill the procurement requirement. Non-Indian contractors may be contacted only after it has been determined that there are no qualified Indian contractors within the normal competitive area that can fill or are interested in filling the procurement requirement.

For the purpose of this Bulletin, "Indian contractor" means a legal entity which is 100% Indian owned and controlled. "Indian" means a person who is a member of an Indian tribe or otherwise considered to be an Indian by the tribe with which affiliation is claimed. "Normal competitive area" means the geographic area within which competition is usually solicited in the filling of a procurement requirement.

As in the past, contracting officers shall:

1. Determine prior to contracting that the contractor is eligible to receive a contract under the "Buy Indian Act".
2. Obtain competition between Indian contractors when there is more than one that can fill the procurement requirement.
3. Adhere to all applicable requirements in the Federal and Interior Procurement Regulations (41 CFR 1 as Supplemented by 41 CFR 14).

4. Maintain a list of eligible Indian contractors within their respective areas and periodically furnish a copy thereof to all other Bureau contracting officers.
5. When appropriate, based on the type of procurement, include in the contract the percentage of work the contractor must perform with its own employees.
6. Make sure that the price of a contract awarded is fair and reasonable.

Any questions concerning this Bulletin should be addressed to the Contracting Staff in the Washington Office.

Regulations implementing the Buy Indian Act are being prepared and should be issued within the next few months.

/s/ Morris Thompson
Commissioner of
Indian Affairs

APPENDIX C

DETERMINATIONS AND FINDINGS AUTHORITY TO NEGOTIATE A CLASS OF CONTRACTS UNDER THE FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT OF 1949, AS AMENDED

FINDINGS

1. The Bureau of Indian Affairs proposes to procure a class of contracts for supplies and non-personal services (including construction) by negotiating with Indian contractors exclusive of non-Indian contractors. This D&F applies to all procurements of the Bureau of Indian Affairs issued pursuant to the regulations and policy statements implementing 25 U.S.C. 47, "The Buy Indian Act".

2. The Congress recognized in § 3(a) of P.L. 93-638 the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in Federal services to Indian communities.

3. The Congress has authorized the Bureau of Indian Affairs in 25 U.S.C. 13 to assist Indians throughout the United States by providing for industrial assistance and advancement as well as general support.

4. The Congress has also authorized the Bureau of Indian Affairs in 25 U.S.C. 47 to utilize, so far as may be practicable, Indian labor and the output of Indian businesses.

5. A national policy has been set by the Congress in § 201 of P.L. 95-507 to recognize that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy.

6. Further, Congress has recognized the need for and has established an Indian Business Development Program to stimulate and increase Indian entrepreneurship and employment, 25 U.S.C. 1521.

7. In issuing Executive Order 11625 dated October 13, 1971, the President has directed that every effort be made to foster the expansion and development of existing, newly organized, or prospective profit-oriented minority business concerns which include Indian businesses.

8. Historically, it has been impracticable to carry out the Congressional and Presidential policies and mandates set forth above, and in other pertinent authorities, as related to the Indian business community, by the use of standard formal advertising procedures. In order to assure participation by Indians in Federal activities impacting Indian communities, in order to provide assistance and general support to the Indian business community, in order to stimulate and increase Indian entrepreneurship and employment, in order to obtain social and economic equality for socially and economically disadvantaged persons and improve the functioning of our national economy, and

in order to utilize to the maximum extent possible Indian labor and the output of Indian businesses, the Bureau of Indian Affairs must negotiate these contracts with Indian contractors.

DETERMINATION

Based on the foregoing findings, I hereby determine that, independently of any other applicable exemption from the requirements of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 251-260), it is impracticable, within the meaning of § 302(c)(10) of the said Act (41 U.S.C. 252(c)(10)), to secure competition by formal advertising in the procurement of the proposed class of contracts for supplies and services, and accordingly the Bureau of Indian Affairs may procure such supplies and services by negotiating with Indian contractors exclusive of non-Indian contractors, without complying with the advertising requirements of § 253 of the said Act (41 U.S.C. 253). This Determination shall not be utilized when the Commissioner or his designee determines that negotiations with Indian contractors would be inappropriate.

Date: Dec. 18, 1979

/s/ William E. Hallett
Commissioner of
Indian Affairs

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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-48

CECIL D. ANDRUS, Secretary of the Interior, ET AL.,
Petitioners,

VERSUS

GLOVER CONSTRUCTION COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

D. D. HAYES, of
BONDS, MATTHEWS, BONDS & HAYES
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Muskoge, Oklahoma 74401

Attorneys for Respondent

February, 1980

UTTERBACK TYPESETTING CO. — PHONE 235-0030 — 3740 S. HOLLIDAY AVE. — OKLA. CITY, OKLA. 73115

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In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-48

CECIL D. ANDRUS, Secretary of
the Interior, ET AL.,
Petitioners,

VERSUS

GLOVER CONSTRUCTION COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The citations to the opinions in the United States Court of Appeals and the District Court contained in the Petition for Writ of Certiorari are accurate.

JURISDICTION

The statement of jurisdiction contained in the Petition is accurate.

QUESTION PRESENTED

The question presented is accurately and succinctly stated in the Petition.

STATUTORY PROVISIONS INVOLVED

The Petition accurately and adequately sets forth the statutory provisions involved.

THE PARTIES

The Petitioners will hereinafter be referred to as BIA, the Government, or Petitioners. Glover Construction Company will herein be referred to as Respondent.

STATEMENT OF THE CASE

In March of 1976 the BIA, by and through the Commissioner of Indian Affairs, issued a memorandum interpreting 25 U.S.C. § 47, recently known as the Buy Indian Act. 25 U.S.C. § 47 was originally a priviso to a statute passed in 1910. Under the 1976 interpretive memorandum, bidding on contracts with the BIA is restricted to Indian-owned companies. Non-Indian companies are permitted to bid only if Indian companies are not available.

On March 25, 1977, a contract for the construction of five miles roadway in Pushmataha County, Oklahoma, was awarded to Indian Nations Construction Company.[1] Re-

[1] In this connection the Government, in Footnote 5 of its brief states that we have misstated the evidence in our brief in opposition to certiorari, with regard to the involvement of a non-Indian, Hubert Day, in this corporation, and with regard to whether Indians are working on the Hanobia Road project. The Government is wrong. Exhibit A to the Government's motion for summary judgment in the District Court states clearly and unequivocally that Hubert A. Day is Treasurer and General Manager of Indian Nations, as well as being one of the original incorporators. The Government's suggestion that he is just job

spondent requested the opportunity to bid on the project, but was not permitted to bid because Respondent's company is not Indian owned. The contract price was $1,219,-481.00. The engineer's estimate was $963,117.48. The first five miles of the roadway was built by Respondent, under normal bidding procedures, at a price of $538,000.00.

Respondent filed suit in the district court, asserting that the agency's interpretation of 25 U.S.C. § 47 was arbitrary, capricious, and unreasonable, and that the same was in violation of 41 U.S.C. § 253. Respondent further asserted that the contract with Indian Nations was void for the same reasons the agency's interpretation of the statute was invalid. Both parties filed motions for summary judgment.

1 (Continued)
superintendent is a misstatement of the facts. The Government also asserts that we have misstated the facts about Indian workers, citing the Wing deposition and the Donahoe deposition. At pages 26 and 27 of the Donahoe deposition, the following exchange is reported:

"Q. Have you ever made an inspection or asked an inspection to be made to find out how many Indians were being used on the job that we are talking about, the Hanobia Road job?

A. *No.*" (emphasis added)

At pages 21 and 22 respectively of the Wing deposition, the following exchanges are reported:

"Q. Has the government made any effort to ascertain the number of Indians who are actually employed doing work on this job?

"A. I do not know, I do not think so.

Q. But you don't know whether there is an Indian out there working or not do you?

A. I know that there are at least, I think two (2) but again I have not checked personally to see if there [*sic*] Indians, I can only say that I have seen a couple of the workers who appear to me to be Indians."

41 U.S.C. § 252(c) makes all purchases and contracts for property and services subject to the advertising requirements of Section 253 of that title, unless the contract comes within one of the fifteen enumerated exceptions of Section 252(c). Subsection (e)(B) of Section 252 specifically provides that Section 252 shall not be construed to permit any contract for the construction of roads to be negotiated without advertising as required by Section 253, unless, the contract is to be performed outside the Continental United States or unless negotiation is authorized by paragraphs (1)-(3), (10)-(12), or (14) of subsection (c) of Section 252.

In the district court, the Government asserted that the negotiation of roadway contracts by the Bureau of Indian Affairs was permitted under the "otherwise authorized by law" exception stated in paragraph 15 of Section 252(c). In support thereof, the Government argued that Section 252(e) was merely an admonition and not a prohibition. Also, they urged that 25 U.S.C. § 47 has been administratively interpreted for many years to allow construction contracts to be restricted to only Indian contractors.

The district court rejected the argument that 252(e) was merely an admonition (Pet. for Cert., App. D, 40a). The court noted that Congress specifically exempted seven subsections of Section 252(c) with respect to road construction, but did not include the "otherwise authorized by law" provision of subsection (c)(15) (Pet. for Cert., App. D, 40a).

The court went on to find that the rule of deference to an administrative interpretation did not apply to this case

because the statute was enacted in 1910 and the complained of interpretation, set forth in the 1976 bulletin, may date back as far as 1961 (Pet. for Cert., App. D, 46a).

The court's judgment declared the complained of contract null and void and permanently enjoined the Petitioners from "circumventing the advertising requirements of 41 U.S.C. § 253 in connection with future roadway construction contracts."

Thereafter, the Government appealed to the Tenth Circuit Court of Appeals. The above mentioned arguments were again asserted by the Government and were rejected by the appellate court. In addition thereto, the Government argued that the district court had erroneously concluded that the Federal Property and Administrative Services Act impliedly repealed 25 U.S.C. § 47 and that negotiated roadway contracts should be permitted under a liberal interpretation of 25 U.S.C. § 47, in order to accomplish the remedial purposes of the Act.

The court found no conflict, and thus no implied repeal, in 41 U.S.C. § 252 and § 253 and 25 U.S.C. § 47. The court simply declined to accept the position that the purchase of "Indian supplies" and "products" on the "open market" related to roadway construction contracts (Pet. for Cert., App. A, 14a). The court noted that "It is clear, on its face, however, that the Congress did intend that U.S.C.A. § 252 and § 253 apply to road construction projects" (Pet. for Cert., App. A, 15a).

The court acknowledged that 25 U.S.C. § 47 is a remedial act and is to be given a liberal interpretation. However, the court noted: "Even so, we believe it strains the

most liberal construction to conclude the act's preference for purchase of 'Indian supplies' and 'products' applies to a roadway construction project whose contract price, through Indian construction, is $1,219,481.00" (Pet. for Cert., App. A, 19a).

The decision of the district court was AFFIRMED.

SUMMARY OF ARGUMENT

I.

25 U.S.C. § 47 was originally a proviso to Section 23 of the Act of June 25, 1910. Section 23 was enacted to require the Indian Service to use competitive bidding in the purchase of its supplies. As such, Section 23 was a remedial statute and should be liberally construed to encourage competitive bidding.' 47 U.S.C. § 25, being the proviso to that section, should be construed in light of the enacting clause of Section 23, and the purposes to be achieved by Section 23. According to general principles of statutory construction, the proviso, 25 U.S.C. § 47, should be strictly construed.

II.

25 U.S.C. § 47 was passed in 1910. At the very earliest, the BIA began interpreting the statute to relieve it from competitive bidding requirements on roadway construction in 1961. The interpretive bulletin which was challenged in the district court by the Respondent is dated March 3, 1976. It is a generally accepted proposition that a contemporaneous administrative interpretation of the statute by an administrative department is entitled to great weight,

but that an administrative interpretation several years after an enactment is entitled to no weight.

III.

The mere fact that 25 U.S.C. § 47 applies to Indians does not require this Court to blindly rubberstamp the interpretation of the statute urged by the Government. The general rule suggesting a liberal interpretation of the statutes relating to Indians does not require the Court to disregard the intent of the Legislature in enacting the statute. This is particularly true, where, as in this case, the Government's interpretation does not benefit the Indian community, and may, in fact, be detrimental to the Indian Community in general.

IV.

Roadway construction contracts with the BIA were regulated by 41 U.S.C. § 5, until 41 U.S.C. § 252 and § 253 were made applicable to the BIA. Both statutes make such contracts subject to the competitive bidding requirements of the law. 25 U.S.C. § 47 only relates to Indian supplies and products of Indian industry. Five miles of roadway construction, costing $1.2 million dollars does not fall into the category of being Indian supplies or products.

ARGUMENT

I.

ROAD CONSTRUCTION PROJECTS ARE NOT SUPPLIES OR PRODUCTS AVAILABLE IN THE OPEN MARKET WITHIN THE MEANING OF 25 U.S.C. § 47.

The ultimate issue before this Court is the question of whether 25 U.S.C. § 47 permits the BIA to let roadway construction contracts to Indian-owned corporations without advertising or competitive bidding.

In order to resolve the above stated issue, the statute itself, and the circumstances surrounding its enactment must be carefully considered.

25 U.S.C. § 47 provides:

> "So far as may be practicable Indian labor shall be employed and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior."

Section 47 was codified from the Act of June 25, 1910, ch. 431, § 23, 36 Stat. 861, which provides in its entirety, as follows:

> "That thereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty seven hundred and nine of the Revised statutes of the United States: Provided, that so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in the open market in the discretion of the Secretary of the Interior. All acts and parts of acts in conflict with the provision of this section are hereby repealed."

Section 3709, now codified as 41 U.S.C. § 5, required advertisement before purchases were made by Government agencies.

Section 23 of the Act of June 25, 1910 was a remedial statute. This fact has been emphasized in the lower courts and is heavily relied upon by the Government. The legal principles concerning construction of remedial statutes are well settled. The Court's attention is respectfully invited to 82 C.J.S., *Statutes,* § 388, which provides as follows:

> "In construing remedial statutes, regard should be had to the former law, the defects to be cured or abolished, or the mischief to be remedied, and the remedy provided, and, they should be interpreted liberally to embrace all cases within their scope, so as to accomplish the object of the legislature, and to effectuate the purpose of the statute by suppressing the mischiefs and advancing the remedy, provided it can be done by reasonable construction in furtherance of the object."

In the case of *Stewart* v. *Kahn,* 11 Wall. 493, 20 L.Ed. 176 (1871), at page 504 this Court stated:

> "The statute is a remedial one and should be construed liberally to carry out the wise and salutary purposes of its enactment. . . . Considering the evils which existed, the remedy prescribed, the object to be accomplished, and the considerations by which the law makers were governed — lights which every court must hold up for its guidance when seeking the meaning of a statute which requires construction — . . ."

Since Section 23 (25 U.S.C. § 47) was a remedial statute, certain critical questions concerning why it was enacted must be asked. What evil did Congress want abol-

ished? What defect needed to be cured? What mischief did Congress want to suppress?

Judge McKay's dissenting opinion (Pet. for Cert., App. 23a), identifies exactly the purpose Congress desired to achieve:

> "Prior to the passage of the amendment, the House Committee on Indian Affairs commented on its purpose and compared it to the version being amended:
>
> > The purpose of this section is patent from the text. If this section shall be enacted into law it will repeal the following portion of the act of April 30, 1908 (35 Stat., 71):[2]

Clearly the defect Congress desired to correct was the Indian Appropriation Act, April 30, 1908 (35 Stat. 71).

The reasons why the above mentioned Act was repealed are stated in unequivocal terms by Rep. Burke, 45 Cong. Rec. 6097 (1910). The Government has quoted por-

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[2] That no purchase of supplies for which appropriations are herein or hereinafter made for the Indian service, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in case of exigency, when, in the discretion of the Secretary of the Interior, who shall make official record of the facts constituting the exigency, and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars at any one purchase: *Provided,* That hereafter supplies may be purchased, contracts let, and labor employed for the construction of artesian wells, ditches, and other works for irrigation, not to exceed the sum of five thousand dollars in any one purchase or contract, in the discretion of the Secretary of the Interior, without advertising as hereinbefore provided: *Provided further,* That as far as practicable Indian labor shall be employed and purchase in the open market made from Indians, under the direction of the Secretary of the Interior." [Indian Appropriation Act, April 30, 1908 (35 Stat. 71)]

tions of Rep. Burke's remarks at pages 14, 25, 26 and 35 of their brief. We believe his remarks, in their entirety, are worthy of this Court's consideration:

> "Mr. Burke of South Dakota. The law which it is proposed to repeal is not only unnecessary but wholly indefensible. Until within recent years it has been subject to abuse in administration. Under it there is practically no limitation on the amount of purchases of supplies that may be made without advertising. The law has been construed — erroneously, as I believe — to exempt purchases in amounts not to exceed $500 at any one time from advertising in any form or manner. Therefore purchases not to exceed $500 in value may be legally multiplied indefinitely.
>
> "The ostensible limitation on exigency purchases not to exceed $3,000 at any one purchase is in legal effect no limitation at all, as purchases of that amount may be multiplied at the pleasure of the department. During the administration of the Interior Department by Secretary Garfield regulations were promulgated to correct the abuse which had grown up under the law and permitted by it, and purchases of Indian supplies were required to be made in conformity with the law applicable to all other branches of the public service embodied in section 3709, Revised Statutes. The existing law, which in the absence of regulations nullifying it, permits abuses of the nature described and which have been and may again be practiced with impunity should be repealed. The legislation proposed will give the Indian service all the relief from a strict compliance with the general law (section 3709) that is necessary in the interest of good administration. There is no reason why Indian service contracts for either supplies or irrigation systems should not conform to the law applicable to all other branches of the public service except in so far as the proviso in the proposed

> legislation affects the purchases of products of Indian industry and the employment of Indian labor. The existing law on the subject is capable of great abuse, is wholly unnecessary, and absolutely indefensible."

There can be no doubt but that Congress passed this statute to correct flagrant abuses in purchasing within the Indian Service, and further that Congress prescribed advertising and competitive bidding as the remedy for those abuses.

The suggestion that this statute, which was enacted to compel competitive bidding, would be used to justify the award of a $1.2 million dollar contract without competitive bidding is utterly incomprehensible, and in direct opposition to the remedial purposes of the Act.

It is also significant to note that the Act of April 30, 1908, specifically permitted the Indian services to let construction contracts, somewhat analogous to roadway construction, in amounts less than $5,000, without advertising or competitive bidding. When Section 23 was enacted, that portion of the 1908 Act dealing with construction was entirely omitted. Obviously, Congress knew that the Indian Service was involved in construction contracts, and, likewise, it is obvious that Congress intended that expensive construction projects be subject to competitive bidding. Had Congress desired to exempt certain construction projects from competitive bidding, the construction provisions in the 1908 Act would have been modified instead of being completely deleted.

In *Stewart* v. *Kahn, supra,* at page 502, this Court stated:

> "It is a rule of law that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled."

During the years immediately preceding and after the 1910 legislation, the Secretary of the Interior repeatedly stressed the need for securing more competition and lower prices in the purchase of supplies for the Indian Service. In the *Report of the Secretary of Interior for the Fiscal Year Ended June 30, 1909,* at page 26, it is stated:

> "The Indian Service is purchasing about $2,000,000 worth of supplies each year under a system which is in no wise based on commercial methods, as a result of which there is a lack of competition because Indian business can not be as enticing to manufacturers as commercial business, goods are not being obtained at the best prices, and trade discount is an unknown factor."

In the *Report of the Secretary of Interior for the Fiscal Year Ended June 30, 1910,* at page 39, it is stated in reference to a recommendation to discontinue certain warehouses:

> "I believed that such a change would result in a net saving to the Government in the purchase of Indian supplies by securing wider competition, especially among local business firms. . . ."

In the *Report of the Secretary of Interior for the Fiscal Year Ended June 30, 1912,* at page 60, it is stated with regard to payment of claims:

> "Prompt payment is expected to increase competition and to lower prices."

During the relevant time period surrounding the enactment of 25 U.S.C. § 47, this writer could find nothing in the above mentioned reports[3] or in the other reports cited in the Petitioner's brief concerning preferential purchases from Indian contractors. The purchase of supplies for the Indian Service was extensively discussed, and as above stated, the recurring theme on the subject of supplies was the need for more competition.

That Congress intended the Act in question to jusitfy a negotiated contract for five miles of road construction is rendered even more inplausible when it is remembered that the Federal Government did not even get into the businss of funding roads on Indian reservations until 1935,[4] twenty-five years after the passage of the Act.

That part of Section 23 which the Government at this late date refers to as the "Buy Indian Act" was originally a proviso to the section.

Respondent suggests that the proviso to Section 23 should be interpreted in accordance with general principles of statutory construction.

The proper function of a proviso is to restrict, limit or qualify some portion of the enacting clause of the statute

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[3] Neither the reports above quoted nor the reports quoted in the Government's brief were offered as evidence in the lower court. Other examples of the Government expanding the rcord may be found at page 33 of their brief and Appendix C of their brief. Appendix C is even dated after this Court granted certiorari. Since the Government has seen fit to quote from Government reports not offered in evidence, we have no choice but to follow suit.

[4] American Indian Policy Review Commission, Final Report, submitted to Congress May 17, 1977, Vol. I, page 356.

wherein it is contained. Provisos should be strictly construed.

The foundation case for interpretation of provisos in statutes is *United States* v. *Dickson, et al.*, 15 Pet. 141, 10 L.Ed. 689 (1841). At page 162 this Court stated:

> ". . . we are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves special exceptions only out of the enacting clause; and those who set up any such exception, must establish it as being within the words as well as within the reason thereof."

This Court's attention is also invited to *Hollander* v. *Magnoe*, 149 U.S. 586, 13 S.Ct. 932, 3 L.Ed. 860 (1893). At page 591 this Court explained:

> *"The natural limitation of a proviso is to those things that have been previously mentioned.* Before the proviso, there are named only wines — sparkling and still; so any word of general description used therein would, in the absence of satisfactory reasons to the contrary, be taken to refer to those articles, to-wit, wines." (Emphasis added)

Based on the foregoing authorities, it is reasonable to suggest that the objects of a proviso are limited to some special variation of the object regulated in the enacting clause, or is a special exception carved out of the object regulated by the enacting clause.

In the instant case, there is no question but that the object regulated in the enacting clause is Indian supplies. No other object is even mentioned in the enacting clause. Applying the above quoted authority to the statute, no other conclusion can be reached but that the scope of "products of Indian industry . . . in the open market" is limited to the purchase of Indian supplies. Simply stated, the type of Indian supplies exempted from competitive bidding, are products of Indian industry.

The Government can reach the conclusion that roadway construction is a "product" only if the enacting clause of the statute is absolutely ignored in interpreting the proviso. This, of course, is exactly what the Government has done. No effort is made by the Government to argue that "Indian supplies" includes roadway construction.

As hereinbefore stated, the statute in question is a remedial statute. This Court made it clear in the case of *Cresent Express Lines* v. *United States*, 320 U.S. 401, 88 L.Ed. 127 (1943), that provisos in remedial statutes are subject to the same rules of construction as other statutes. At page 409 the Court stated:

> "As the act is remedial and to be construed liberally, the proviso defining exemptions is to be read in harmony with the purpose of the measure and held to extend only to carriers plainly within its terms."

Without regard to the remedial purpose of promoting competitive bidding, and without regard to long-standing rules of statutory construction, the language of the Act itself simply does not include roadway construction. Five miles of roadway in Pushmataha County, Oklahoma, is

simply not "Indian supplies", nor is it a "product" for sale on the "open market."

In the case of *Sanborn* v. *Commissioner of Internal Revenue*, 88 F.2d 137 (8th Cir. 1937), *cert. den.* 301 U.S. 700, the Court stated:

> "The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of the hard case and the ingenuity and study of an acute and powerful intellect would discover."

In 1910 the plain, obvious and rational meaning of Indian supplies and products for sale on the open market would probably have included foodstuffs, blankets, bolts of cloth and other similar commodities. In 1980, it might include electronic calculators, typewriters, computers, or anything else for sale in the market place. Freeways, public buildings, and roads are not products and are not for sale in the open market.

Had Congress intended that the proviso in the statute apply to roadway construction, it is more than just improbable that curious language like "products of Indian industry . . . in the open market" would have been selected to demonstrate that intent. The 1908 version of this Act had standard construction project language in it. Congress had to be aware of this language since their avowed purpose in passing this Act, was to repeal the 1908 Act. In the 1908 version of the Act, when Congress desired to exempt from competitive bidding construction of artesian wells, ditches, and irrigation works up to $5,000.00, the language used was ". . . Construction of artesian wells,

ditches, and works of irrigation. . . ." *Indian Appropriation Act*, April 30, 1908 (35 Stat. 71).

Respondent is aware that this Court has cautioned against undue reliance upon rules of statutory construction. *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221, 73 S.Ct. 227, 97 L.Ed. 260 (1952). However, Respondent suggests that, when the legislative history is "rather scanty" in the words of Judge McKay (Pet. for Cert., App. 22a) and "somewhat sparse" according to the Government (Brief of Pet. 25), the rules of statutory construction must be given added significance. This is particularly true where the application of the rules, the legislative history, and the language of the Act all lead to the same interpretation. In this case, all three tests for legislative intent suggest that roadway construction is not a product of Indian industry in the open market.

II.

THE BIA'S RECENT ADMINISTRATIVE CONSTRUCTION THAT ROADWAY CONSTRUCTION IS EXEMPT FROM COMPETITIVE BIDDING IS ENTITLED TO NO WEIGHT.

Whether the administrative interpretations that roadway construction contracts with Indian-owned companies is exempt from competitive bidding is entitled to any weight depends upon the history of that interpretation. The evidence is disputed as to when the BIA first commenced interpreting Section 47 to include roadway projects. 20 BIAM Bulletin 1 is dated March 3, 1976 (Brief of Pet. App. 7a). The last paragraph of the Bulletin is particularly interesting on the point. It states:

> "Regulations implementing the Buy Indian Act are being prepared and should be issued within the next few months."

Respondent suggests that 67 years is a long time to wait for the preparation and issuance of implementing regulations. The Solicitor's opinion authorizing the complained of interpretation is dated 1971 (Pet. for Cert., App. 59a). The opinion itself states the practice had been in existence for ten years at that time. Whether the complained of interpretation commenced in 1976, 1971 or 1961 is probably immaterial. In any event, it did not exist prior to 1961. The Statute itself was enacted in 1910. For fifty-one years, viewing the evidence in the light most favorable to the BIA, neither the BIA nor anyone else interpreted 25 U.S.C. § 47 as encompassing roadway construction projects. Clearly, if the intent of Congress in 1910 had been to restrict roadway construction projects to Indian-owned corporations, and to not even permit non-Indian companies the right to submit a bid, somebody would have discovered that intention before fifty-one years had elapsed. The cases are legion that stand for the proposition that a contemporaneous administrative interpretation of a statute by an administrative department is entitled to great weight, but that an administrative interpretation several years after enactment is entitled to no weight. *See, United States* v. *Missouri Pacific R.R.*, 278 U.S. 269, 280 (1929); *Udal* v. *Tallman*, 380 U.S. 1 (1965); *United States* v. *Manzi*, 16 F.2d 884 (1st Cir. 1926).

Citizens Band of Pottawatomie Indians of Oklahoma v. *United States*, 391 F.2d 614 (Ct. Cl. 1967), *cert. den.* 389 U.S. 1048 (1968), is a case involving an attempt by an administrative agency to change its interpretation of a leg-

islative enactment many years after the passage of the act. This case involved the interpretation of a treaty entered into between the United States Government and the United Tribes of Ottawas, Chippewas, and Pottawatomies. The dispute arose over whether the United States in a treaty of August 24, 1816, reserved certain lead deposits from lands ceded to the above named Indian Tribes. The Indian Claims Commission determined from a subsequent treaty in 1929 between the United States and the same tribes that the lead deposits in question were reserved to the United States in the 1816 treaty.

The court looked to the records and correspondence of the government agency following the 1816 treaty, and therefrom determined that the Government had acknowledged that the Indians had retained the lead deposits under the Government's interpretation of the treaty shortly after the treaty had been approved. The court then ruled the interpretation nearer in time to the enactment prevailed over a later interpretation.

In reversing the Indian Claims Commission, the Court reasoned as follows:

> "Certainly, where administrative practice has been consistent and generally unchallenged, such 'practice has peculiar weight when it involves a contemporaneous construction of a statute by the man charged with the responsibility of setting its machinery in motion (and) making the parts work efficiently and smoothly * * *' (Citation omitted). And, where such practice is disputed in later years, more weight should be given to the interpretation made closer in time to the making of the law to be construed."

In short, the Respondent submits to the Court that the foregoing cases and authorities stand for the proposition that neither the BIA nor any other agency of government can circumvent the function of Congress by virtually enacting a new law through simply giving a new or different interpretation to an old statute. This principle was very succinctly pointed out in the case of *Bowers* v. *West Virginia Pulp & P. Co.*, 297 Fed. 225 (2d Cir. 1924), wherein the Court, in a per curiam opinion stated:

> "Changes in treasury decisions do not change the law, but merely announce a change in opinion about the law of some official."

The Government takes the position that the reports of the Secretary of Interior and Commissioner of Indian Affairs, which were contemporaneous with the passage of the Act, support their present-day interpretation of the Act (Brief of Pet. 27, 28, 29, and 30). That simply is not the case. The reports do indeed speak repeatedly in terms of employment of Indians, but they say nothing about exempting construction projects from competitive bidding.

Respondent has argued at every stage of this proceeding, commencing with its motion for summary judgment in the district court, that Indian labor should be given a preference in BIA projects. Respondent also suggests that both the complained of interpretative bulletin and the application of the bulletin ignores the question of employment of Indian workmen.[5]

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[5] See depositions of Wing and Donahoe at Footnote 1.

Finally, Respondent suggests that the racial heritage of the stockholders of a corporation is entirely immaterial to the racial heritage of the workmen employed by the Corporation. There is no reason why the BIA cannot require an affirmative action plan or other similar device to assure the employment of Indian workmen on BIA projects.

III.

THE SPECIAL RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND THE INDIANS DOES NOT COMPEL A STRAINED INTERPRETATION OF 25 U.S.C. § 47.

Respondent is aware that this Court is committed to the rule that doubtful expressions are to be resolved in favor of the Indians. *McClanahan* v. *Arizona Tax Commission,* 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973). There are, however, certain limitations upon the application of the above mentioned rule. In *DeCoteau* v. *District County Court,* 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975), this Court declined to rewrite a 1891 statute in furtherance of a liberal construction. At page 447, this Court observed:

> "We give this rule the broadest possible scope, but it remains at base a cannon for construing complex treaties, statute, and contracts which define the status of Indian tribes. *A cannon of construction is not a license to disregard clear expressions of tribal and congressional intent.*" (Emphasis added)

In order to categorize roadway construction as a product of Indian industry in the open market, it would be necessary to rewrite the statute to include the construction

language of the 1908 version of the Act which Congress clearly and intentionally deleted from the Act of June 25, 1910.

In *Oliphant* v. *Suquamash Indian Tribe,* 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), at footnote number 17, this Court indicated that surrounding circumstances and legislative history outweigh the rule of liberal construction.

As has been heretofore shown, the statute in question was a competitive bidding law designed to eliminate abuses and encourage competition in the purchase of Indian supplies. The history and circumstances of the Act show that it was completely disconnected with construction projects of any type.

Respondent would further respectfully suggest that just because the Government says that exemption of roadway construction from competitive bidding would benefit the Indians, does not necessarily make that statement a fact. As has been heretofore shown, the complained of Bulletin and the application of the Bulletin on the project in question, does not create jobs for Indian workmen.

The Court's attention is respectfully invited to the *American Indian Policy Review Commission, Final Report,* submitted to Congress May 17, 1977, Volume I at page 357, it is stated:

> *"Road Maintenance*
>
> "Maintenance on roads under BIA's jurisdiction has been estimated by its Division of Transportation to be about 40 percent adequate. In the hearings for 1976 appropriations it was estimated that the BIA's road

system was deteriorating at the rate of about $40 million a year. For the same period BIA was obligating about $9 million a year for maintenance. A considerable portion of the road construction budget is admitted to go for the reconstruction and upgrading of prematurely deteriorated roads."

At page 358 of the same report, the following appears:

"Needs and Adequacy of Roads

"Assessments of overall road needs on reservations until recently have been based on several types of comparisons. Comparisons made of road mileage per area and population for reservations and Non-Indian areas were made. Comparisons made of reservations with surrounding nonreservation counties have been the most reasonable. They have consistently shown Indian road networks to be about one-half the density of non-Indian networks.

"The existing provision of road construction and maintenance by the BIA combined with the roads provided by surrounding States and counties is *clearly inadequate*. The BIA's estimates suggest that one-half of the $80 million requested for construction and maintenance in 1977 is required to simply maintain the status quo. The remaining $40 million for upgrading and expanding the system is clearly inadequate compared to the FHWA Study. *It is obvious that the existing system cannot be improved let alone expanded under the current budget levels.*

"Inadequate transportation systems are a hindrance to development. Reservation transportation networks should be related to tribal development plans as well as to social and education needs. In the long run, however, the level, type, and distribution of economic activities will significantly determine the extent to

which roads remain usable and safe. There is clearly a need, legal basis, and strong precedent for greater Federal support in road construction and maintenance." (Emphasis added)

Bearing in mind that the first five miles of the Hanobia Road was built by Respondent at $538,000.00, under competitive bidding, and the second five miles, without competitive bidding, costs $1.2 million dollars, while the engineer's estimate of the cost was only $963,117.48, it is not unfair to suggest that the Indian community as a whole would greatly benefit from competitive bidding on roadway construction projects.

IV.

41 U.S.C. SECTION 5 AND 41 U.S.C. SECTIONS 252 AND 253 REQUIRE THE BIA TO ADVERTISE AND OBTAIN COMPETITIVE BIDS ON ROADWAY CONSTRUCTION PROJECTS.

Respondent has no significant dispute with much of what the Government states in Part II, Subsection A of their brief (Brief of Pet. 33-38).

As Respondent understands Part II, subsection A, the Government takes the position that before the passage of 41 U.S.C. § 252 and § 253, the BIA and its predecessor, the Indian Service, were regulated by Section 3709 or 41 U.S.C. § 5. Insofar as the purchase of "Indian supplies" were concerned the Secretary, when practicable, could show a preference for the products of Industry now in the "open market." Respondent, of course, does vigorously dispute the Government's contention that roadway construction falls within the purview of Indian supplies and products of In-

dian industry available on the open market. Respondent has hereinbefore stated its position on that issue.

In short, it is sufficient to say that, since 25 U.S.C. § 47 does not cover roadway construction, Section 3709 (41 U.S.C. § 5) required that roadway construction contracts be based on advertising and competitive bidding.

Just as 41 U.S.C. § 5 required the BIA to advertise and obtain bids on roadway construction contracts, when 41 U.S.C. § 252 and § 253 became applicable to the BIA, the competitive bidding requirements continued.

Section 252(c) makes all purchases and contracts for property and services subject to the advertising requirements of Section 253, unless they come within the fifteen enumerated exceptions of Section 252. The relevant portions of 41 U.S.C. § 252 are as follows:

> *"41 U.S.C., Sec. 252 — Negotiated purchases and contract for property: conditions.*
>
> (c) All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if - - -
>
> (15) otherwise authorized by law.
> *Exceptions to this section:*
>
> (e) *This section shall not be construed to:* . . . (B) permit any contract for the construction or repair of buildings, *roads,* sidewalks, sewers, mains, or similar items to be negotiated without advertising as required by Section 253 of this title, unless such contract is to be performed outside the continental United States or unless negotiation of such contract is authorized by the provisions of paragraphs (1)-(3), (10)-(12), or (14) of subsection (c) of this title." (Emphasis added)

Respondent is led to believe that the Government concedes that the above quoted statute applies to the BIA. That the statute applies to roadway construction is inescapable from language of the Act. Section 253 requires competitive bidding. It is therefore apparent that the roadway project in question is subject to competitive bidding, unless the project is somehow excepted from the application of the statute. The Government's position in the 1971 Solicitor's opinion, in the district court, and in the circuit court, was that the project in question fell within the "otherwise authorized by law" provisions of subsection (c), and that subsection (e)(B) was merely an admontion and not a prohibition. Their theory was that the project was otherwise authorized by law because it was negotiated pursuant to 25 U.S.C. § 47.

Now, at this stage of the proceedings, the Government has modified its position. Apparently, it now asserts that the BIA in no way looks to Section 252(c)(15) for authorization to dispense with competitive bidding on roadway projects. That the source of such authorization is entirely 25 U.S.C. § 47, and since Section 252(c)(15) is not necessary for authorization, Section 252(e)(B) has no application.

We agree with the Government that subsection (e) is limited in scope to the matters covered in subsection (c), but subsection (c) clearly applies to "all purchases and contracts for property and services", except the 15 enumerated exceptions. If, as the Government now contends, the project in question does not fall into any of the above mentioned enumerated exceptions to subsection (c), then

clearly the general requirements of both subsection (c) and (e) apply. The Government's theory would make subsection (e) only applicable to the exceptions to subsection (c). We believe it applies to the enacting clause as well as the exceptions.

The issue is largely academic, because in order to escape the requirements of Sections 252 and 253, whatever the proper interpretation of them may be, 25 U.S.C. § 47 must be construed to apply to roadway construction contracts. As has been heretofore shown, roadway construction does not fall into the category of Indian supplies or products in the open market, and, therefore, the requirements of Sections 252 and 253 must be complied with on roadway construction.

In this connection, the Government erroneously asserts that the lower courts must have concluded that 41 U.S.C. § 252(e) impliedly repealed 25 U.S.C. § 47. They then cite *Morton* v. *Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), for the proposition that repeals by implication are not favored. The Government has completely missed the point. The lower courts simply concluded that 25 U.S.C. § 47 did not apply to roadway construction projects. This conclusion is further supported by the expression of Congressional intent concerning the passage of 41 U.S.C. § 252 in 1949 by the following statement found in *House Report* No. 670, May 24, 1949, 81st Cong., 1st Sess., 1949 U.S. Code Cong. and Adm. News, 1457, 1498, wherein it stated:

> "(e) For clarity this subsection provides that Section 302, 41 U.S.C. 252, does not authorize or change the existing requirements for authorization for the erection or repair of buildings, roads, sidewalks, or similar items."

It is significant to remember that the evidence shows the Government only began to interpret 25 U.S.C. § 47 to relieve the BIA of competitive bidding requirements on roadway projects in 1961, at the very earliest.

CONCLUSION

The judgment of the Tenth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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No. 79-48

In the Supreme Court of the United States

OCTOBER TERM, 1979

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

GLOVER CONSTRUCTION COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

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REPLY BRIEF FOR PETITIONERS

The issue in this case is whether the Buy Indian Act, 25 U.S.C. 47, authorizes the Secretary of the Interior to negotiate with a wholly-owned Indian corporation for the construction of a road in an Indian area subject to regulation by the Bureau of Indian Affairs. In our opening brief (pages 17-26, 31-33) we showed that the language, legislative history, and purpose of the Act compel the conclusion that Congress intended the Act to apply to a broad range of economic activities, including construction work of any kind. In addition, we pointed out that, ever since the Act was passed in 1910, the Bureau of Indian Affairs has consistently construed the Act to cover road, irrigation and other similar construction projects (*id.* at 27-31). Although conceding (Br. 17) that "electronic calculators, typewriters, computers, or

anything else for sale in the market place" falls within the scope of the Act, respondent nonetheless contends that road construction does not. We submit that nothing in the authorities cited by respondent supports this artificial distinction between goods and construction.[1]

a. Respondent correctly observes that the Buy Indian Act was enacted as part of an advertising statute concerning the Indian Service, BIA's predecessor. See Act

[1]At the outset, we note that respondent repeatedly mischaracterizes the Buy Indian Act program in general and the Indian Nations contract in particular. Respondent intimates (Br. 2-3 n.1, 21 & n.5) that Buy Indian contracts, such as the road construction contract involved in this case, do not create economic opportunities for Indians, except perhaps for the nominal owners of an Indian corporation. But Indian Nations Construction Company is owned and managed by three Indians. (For example, the record in this case shows that Nat Marshall, an Indian, and not Hubert Day, the non-Indian construction superintendent, negotiated the Honobia Road contract with BIA (Wing Dep. 10-14, 42-44; Donahoe Dep. 8-11).) Moreover, although BIA did not ascertain how many Indian laborers are employed by Indian Nations, the Honobia Road contract, in accordance with BIA regulations, required that Indian Nations give preference to Indian workers (see Wing Dep. 42-44; contract paragraphs 25, 30, add. 32, add. 37; 44 Fed. Reg. 62510-62515 (1979) (to be codified at 41 C.F.R. 14-1 through 14-7)), and a BIA engineer testified that, while inspecting the construction site, he noticed that at least some of the laborers were in fact Indians. Furthermore, as we discussed in our opening brief (page 33 & n.29), the decision of the court below has resulted in a virtual halt in BIA's Buy Indian road contracting, thereby forcing several Indian firms out of business.

of June 25, 1910, ch. 431, Section 23, 36 Stat. 861.[2] Because the general advertising requirement applied to "purchase of Indian supplies," respondent argues (Br. 16) that "the scope of [the Buy Indian Act] is limited to the purchase of Indian supplies." Since, in respondent's view, "supplies" denotes only movable items or goods, road construction work is not covered by the Buy Indian Act. In other words, the Buy Indian preference established in the second sentence of Section 23 must apply only to the limited type of transactions discussed in the first sentence of that statute. We disagree.

Insofar as "Indian supplies" defines the scope of the Buy Indian preference established in the second sentence of the Act, it applies equally to the employment of "Indian labor" as well as to the purchases of the "products of Indian industry." It is thus apparent that Congress did not intend the phrase "Indian supplies" to limit the Act to preferential purchases of blankets, foodstuffs or other goods. Moreover, the legislative history makes clear that Section 23 was intended to "bring the Indian Service * * * under the provision of [the general advertising statute]" (H.R. Rep. No. 1135, 61st Cong., 2d Sess. 12 (1910)), and that "Indian supplies" was simply a shorthand reference

[2]Section 23 provided in full:

> That hereafter the purchase of Indian supplies shall be made in conformity with the requirements of section thirty-seven hundred and nine of the Revised Statutes of the United States: *Provided*, that so far as may be practicable Indian labor shall be employed, and purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior. All Acts and parts of Acts in conflict with the provisions of this section are hereby repealed.

for all Indian Service contracting, which even at that time included the construction of roads, buildings, and irrigation works. See *id.* at 5-6, 12; Act of June 25, 1910, ch. 431, Sections 13 and 17, 36 Stat. 858 and 860; 45 Cong. Rec. 6097, 8900, 8981 (1910).[3]

b. Likewise, nothing in the legislative history cited by respondent suggests that the Buy Indian Act applies solely to goods. Indeed, the respondent's discussion (Br. 10-13) of the legislative history is wholly irrelevant. To be sure, Congress in 1910 attempted to curb the abuses that had characterized the Indian Service's purchases in the past. But those abuses involved unadvertised procurement from *non-Indian* enterprises under the exemptions for small and exigency purchases. This case, of course, concerns preferential purchases from *Indian* firms. And as to that issue, the legislative history is unequivocal: Congress meant to preserve the broad preference for Indian labor and Indian entrepreneurs that had existed in one form or another since at least 1886. See, *e.g.*, H.R. Rep. No. 1135, *supra*, at 12; 45 Cong. Rec. 6097 (1910) (remarks of Rep.

[3]Respondent erroneously asserts (Br. 14) that Congress did not fund road building on Indian reservations until 1935. In fact, the 1908 Indian Appropriations Act specifically authorized the construction of "a wagon road on the Hoopa Valley Indian Reservation." Act of Apr. 30, 1908, ch. 153, 35 Stat. 77. That federal funds were commonly used to construct roads on Indian reservations in Indian areas is also reflected in numerous legislative and administrative reports. See, *e.g.*, S. Rep. No. 278, 60th Cong., 1st Sess. 18-19 (1908); 42 Cong. Rec. 3253, 4561, 4565, 4566-4567, 5020 (1908); *Annual Report of the Commissioner of Indian Affairs* 12-13 (1907), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1907; Annual Report of the Commissioner of Indian Affairs* 17 (1911), reprinted in II *Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1911.*

Burke); 42 Cong. Rec. 1695 (1908) (remarks of Rep. Sherman); Act of May 15, 1886, ch. 333, Section 3, 24 Stat. 46. See generally Pet. Br. 20-26.[4]

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1980

[4]Respondent also suggests (Br. 18-22) that the Secretary's interpretation of the Act is not entitled to deference because it is not longstanding. The factual inaccuracy of this contention has already been pointed out in our opening brief (pages 27-29). We further note that even non-contemporaneous administrative constructions are entitled to significant weight in appropriate circumstances. See, *e.g.*, *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, No. 78-1651 (Feb. 20, 1980), slip op. 22-23 (agency interpretation factor to be considered even though not promulgated until 28 years after enactment of legislation).

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-48

CECIL D. ANDRUS, Secretary of the Interior, *et al.*,
Petitioners,

v.

GLOVER CONSTRUCTION COMPANY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE
BRIEF OF

THE ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., THE NATIONAL CONGRESS OF AMERICAN INDIANS, INC., THE ALASKA FEDERATION OF NATIVES, THE CALIFORNIA TRIBAL CHAIRMEN'S ASSOCIATION, THE MONTANA INTER-TRIBAL POLICY BOARD, THE ARAPAHOE TRIBE OF THE WIND RIVER RESERVATION, THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, THE CHEYENNE RIVER SIOUX TRIBE, THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, THE CROW TRIBE, THE HOOPA VALLEY TRIBE, THE METLAKATLA INDIAN COMMUNITY, THE MICCOSUKEE TRIBE OF INDIANS, THE SENECA NATION OF INDIANS, THE SHOSHONE TRIBE OF THE WIND RIVER RESERVATION, THE STANDING ROCK SIOUX TRIBE, COOK INLET REGION, INC., AND NANA REGIONAL CORPORATION, INC. AS *AMICI CURIAE*

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 42(3), the Association on American Indian Affairs, Inc., a tax-exempt organization having its principal office at 432 Park Avenue South, New York, New York 10016, the National Congress of American Indians, Inc., the Alaska Federation of Natives, the California Tribal Chairmen's Association, the Montana Inter-Tribal Policy Board, the Arapahoe Tribe of the Wind River Reservation, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, the Cheyenne River Sioux Tribe, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, the Crow Tribe, the Hoopa Valley Tribe, the Metlakatla Indian Community, the

Miccosukee Tribe of Indians, the Seneca Nation of Indians, the Shoshone Tribe of the Wind River Reservation, the Standing Rock Sioux Tribe, Cook Inlet Region, Inc., and NANA Regional Corporation, Inc. move the Court leave to file the attached brief *amici curiae* in support of petitioner in the above-captioned case. *Amici* requested the parties to consent to the filing of this brief beginning on December 12, 1979. The petitioner United States of America has consented to the filing of this brief; the respondent Glover Construction Company has refused so to consent.

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope, with a membership of 50,000 that consists of both Indians and non-Indians.

The Association frequently has participated in leading cases involving issues of Indian law before the federal and state courts, including the filing of a brief with this Court in *DeCoteau v. District County Court,* 420 U.S. 425 (1975), and the filing of *amicus curiae* briefs in *Washington v. Washington State Passenger Fishing Vessel Ass'n,* 443 U.S. ___, 99 S.Ct. 3055 (1979), *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584 (1977), *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), *Affiliated Ute Citizens v. United States,* 406 U.S. 128 (1972), *Puyallup Tribe v. Dept. of Game,* 391 U.S. 392 (1968), and *Warren Trading Post Co. v. Arizona State Tax Comm'n,* 380 U.S. 685 (1965).

The National Congress of American Indians, Inc., is a nonprofit association of 146 Indian tribes, including most of the major tribes in this country. It was incorporated in Oklahoma in 1954 to represent the interests of the Indian tribes of this country, and maintains its national headquarters in Washington, D.C.

The Alaska Federation of Natives, located in Anchorage, Alaska, is composed of the twelve regional groups established under the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.* (1976).

The California Tribal Chairmen's Association is a nonprofit corporation formed under the authority of the Indian Self Determination and Education Assistance Act. This statewide organization consists of thirty-one federally recognized tribes in California, with its central office in Sacramento.

The Montana Inter-Tribal Policy Board is an association of all federally recognized tribes in Montana, and maintains its offices in Billings.

NANA Regional Corporation, Inc., and Cook Inlet Region, Inc., are Alaska Native corporations formed under the Alaska Native Claims Settlement Act. NANA maintains its principal offices in Kotzebue, Alaska. Cook Inlet's offices are located in Anchorage.

The Arapahoe Tribe of the Wind River Reservation, Wyoming, the Shoshone Tribe of the Wind River Reservation, Wyoming, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the Hoopa Valley Tribe of California, the Crow Tribe of the Crow Reservation, Montana, the Metlakatla Indian Community of

the Annette Islands Reserve, Alaska, the Miccosukee Tribe of Indians of Florida, the Seneca Nation of Indians of New York, and the Standing Rock Sioux Tribe of North Dakota and South Dakota are important federally recognized Indian Tribes which govern their reservations. Moreover, their reservation economies, which uniformly are in an undeveloped or underdeveloped state, depend in significant degree on the economic stimulus attributable to contracts awarded to Indian-owned firms by the Bureau of Indian Affairs under the Buy Indian Act.

This case presents a general issue of great and continuing concern to the *Amici*—whether Indian preference laws enacted by Congress may be relied upon to enhance the social and economic development of Indian tribes and Indian-owned corporations. In the present case, *Amici* are concerned with this broad question in a specific context—namely, whether the Buy Indian Act, 25 U.S.C. § 47 (1976), which established a preference for the "employment of Indian labor and the purchase of products of Indian industry" retains vitality in light of the advertising requirements of the Federal Property and Administrative Services Act, 41 U.S.C. §§ 252, 253 (1976).

Amici submit the attached brief in order to assist the Court in recognizing that the decision of the United States Court of Appeals for the Tenth Circuit misconstrues the intended scope of the Buy Indian Act and contravenes the numerous precedents of this Court concerning appropriate principles of statutory construction. Since the immediate parties are not likely to address the specific points which *Amici* propose to discuss, and since such discussion thus may be helpful to

the Court, *Amici* request that their motion for leave to file the attached brief *amici curiae* be granted.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-48

CECIL D. ANDRUS, Secretary of the Interior, *et al.*,
Petitioners,

v.

GLOVER CONSTRUCTION COMPANY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

INTEREST OF THE *AMICI*

Amici are five Indian organizations, ten federally recognized Indian tribes and two Alaska Native regional corporation.

The Association on American Indian Affairs, Inc., is a nonprofit membership corporation organized under the laws of the State of New York for the purpose of protecting the rights and improving the welfare of American Indians. The Association is the largest Indian-interest organization in the United States, and is nationwide in scope with a membership of 50,000 that consists of both Indians and non-Indians.

The National Congress of American Indians, Inc., is a nonprofit association of 146 Indian tribes, including most of the major tribes in this country. It was incorporated

in Oklahoma in 1954 to represent the interests of the Indian tribes of this country, and maintains its national headquarters in Washington, D.C.

The Alaska Federation of Natives, located in Anchorage, Alaska, is composed of the twelve regional groups established under the Alaska Native Claims Settlement Act.

The California Tribal Chairmen's Association is a nonprofit corporation formed under the authority of the Indian Self Determination and Education Assistance Act. This statewide organization consists of thirty-one federally recognized tribes in California, with its central office in Sacramento.

The Montana Inter-Tribal Policy Board is an association of all federally recognized tribes in Montana, and maintains its offices in Billings.

The Arapahoe Tribe of the Wind River Reservation, Wyoming, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, the Crow Tribe of the Crow Reservation, Montana, the Hoopa Valley Tribe of the Hoopa Valley Reservation, California, the Metlakatla Indian Community of the Annette Islands Reserve, Alaska, the Miccosukee Tribe of Indians of Florida, the Seneca Nation of Indians of New York, the Shoshone Tribe of the Wind River Reservation, Wyoming, and the Standing Rock Sioux Tribe of North Dakota and South Dakota are important federally recognized Indian tribes which govern their reservations.

NANA Regional Corporation, Inc., and Cook Inlet Region, Inc., are Alaska Native corporations formed

under the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* (1976). NANA maintains its principal offices in Kotzebue, Alaska. Cook Inlet's offices are located in Anchorage.

This case presents a question of great and continuing concern to the *Amici*—whether Indian preference statutes enacted by Congress can be relied upon by Indian tribes and Indian-owned corporations to further their social and economic development. In the present case, the *Amici* are concerned with this broad issue in a specific context—namely, whether the Buy Indian Act, 25 U.S.C. § 47 (1976), which provides a preference for the "employment of Indian labor and the purchase of products of Indian industry" retains vitality in light of the advertising requirements of the Federal Property and Administrative Services Act of 1949, 41 U.S.C. §§ 252, 253 (1976).

In terms of its potential impact on American Indians, the importance of this question cannot be overstated. Virtually every Indian-owned construction company depends on the contracts it is awarded through the Indian preference established under the Buy Indian Act. Indeed, many of these Indian-owned companies have come into existence in large measure because of this Indian preference.

If the Court of Appeals' decision in this case is upheld, the ultimate effect of the determination on the *Amici* Indian tribes, as well as on numerous other Indian tribes whose local Indian-owned enterprises are heavily dependent upon Buy Indian Act contracts, will be extremely deleterious. The reservation economies of the *Amici* Indian tribes are uniformly in an undeveloped or underdeveloped state and they depend in significant degree on the economic stimulus attributable to contracts awarded

to Indian-owned firms by the Bureau of Indian Affairs under the Buy Indian Act.

The *Amici* submit the attached brief in order to assist the Court in recognizing that the decision of the United States Court of Appeals for the Tenth Circuit misconstrues the intended scope of the Buy Indian Act, and contravenes the numerous precedents of this Court concerning appropriate principles of statutory construction. The immediate parties are not likely to address the specific points which *Amici* propose to discuss, and such discussion thus may be helpful to the Court.

SUMMARY OF ARGUMENT

A review of this case, in light of this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1973), demonstrates that the Indian preference provisions of the Buy Indian Act retain vitality despite the advertising requirements of the Federal Property and Administrative Services Act. A determination that the Buy Indian Act does not encompass road construction contracts not only would be inconsistent with the purposes of the legislation, but also would have a debilitating effect on the economic life of numerous Indian tribes and Indian-owned corporations, which would increase their dependence on the Government – the very evil sought to be avoided by the Act. In view of the foregoing, a determination that the advertising requirements of the Federal Property Act are applicable here violates the settled rules of statutory construction concerning the repeal of statutes by implication and the nullification of specific legislation by general.

ARGUMENT

This case, like *Morton v. Mancari,* 417 U.S. 535 (1974), concerns the continued vitality of an Indian preference statute–the "Buy Indian Act" (25 U.S.C. §47)–with its roots in Indian appropriations acts of the late nineteenth century. The Buy Indian Act exempts contracts made by the Secretary of the Interior using "Indian labor" and "products of Indian industry" from ordinary competitive advertising requirements common to federal procurement. The specific issue in this case is whether this preferential exemption from advertising requirements survives the Federal Property and Administrative Services Act of 1949 (codified in scattered sections of 41 U.S.C.).

In *Morton v. Mancari, supra,* this Court determined that provisions of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000 *et seq.* (1976), generally forbidding racial discrimination in federal employment did *not* abrogate a statutory employment preference for qualified Indians in the Bureau of Indian Affairs (BIA) found in the Indian Reorganization Act of 1934 and earlier, nineteenth century Indian appropriations acts. This Court held that the 1972 Act did not repeal by implication the prior Indian preference statutes, reasoning as follows:

> . . . Appellees encounter head-on the 'cardinal rule . . . that repeals by implication are not favored.' . . . There is nothing in the legislative history . . . that indicates affirmatively any congressional intent to repeal the 1934 preference . . . .
>
> This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference is a longstanding, important component of the Government's Indian program. The

> anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

417 U.S. at 549-50.

This Court in *Mancari*—analyzing the relationship between the general 1972 Act and the specific Indian employment preference provisions—also concluded that:

> . . . [T]he Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.

Morton v. Mancari, 417 U.S. at 550-51. *Accord, Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) ("a specific statute controls over a general one 'without regard to priority of enactment'"); *Rodgers v. United States*, 185 U.S. 83, 87 (1902) ("a later statute . . . will ordinarily not affect the special provisions of [an] earlier statute").

The present case is strikingly similar to *Mancari*. Here, as in *Mancari*, a subsequent, general statute governing federal contracting (rather than employment) practices is silent on the subject of contracting for purchases of Indian products (rather than employment of Indians) by the BIA. Here, as in *Mancari*, a prior, longstanding statutory scheme authorizes a preference for Indian products (rather than employees). The later general statute does not reflect any congressional intent to repeal the specific statute establishing Indian preference.

The court below avoided the obvious parallels to *Mancari* by holding that the Buy Indian Act does not apply to roadway construction projects, and thus does not conflict with the Federal Property and Administrative Services Act, which clearly does apply to such projects. This brief will show that the Court of Appeals' restrictive reading of the Buy Indian Act is clear error, and that the language and historical context of that Act establish its broad, remedial purposes to encourage Indian labor of all kinds and purchase of all varieties of Indian products. *Amici* will further show that the very mischief sought to be remedied by the Buy Indian Act and similar contemporaneous statutes—Indian unemployment and dependence on the federal Government—is produced by the decision below. For these reasons, the maxims of statutory construction reaffirmed in *Mancari* cannot be avoided and must be applied to vindicate the policies of the Buy Indian Act.

1. The language and historical context of the Buy Indian Act evidence broad remedial purposes to increase productive employment and enterprise by Indians and reduce Indian dependence on the Government.

The Buy Indian Act as now codified was contained as Section 23 of the Act of June 25, 1910, 36 Stat. 861. Essentially similar provisions are found in virtually every Indian appropriations act between 1886 and 1908.[1]

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[1]Act of May 15, 1886, c. 333, 24 Stat. 29, 46; Act of March 2, 1887, c. 320, 24 Stat. 449, 466-67; Act of June 29, 1888, c. 503, 25 Stat. 217, 237; Act of March 2, 1889, c. 412, 25 Stat. 980, 1002; Act of August 19, 1890, c. 807, 26 Stat. 336, 360-61; Act of March 3, 1891, c. 543, 26 Stat. 989, 1014-15; Act of July 13, 1892, c. 164, 27 Stat. 120, 143-44; Act of March 3, 1893, c. 209,

[footnote continued]

Contrary to the holding below,[2] it requires no "stretch of the imagination" to construe the statutory language to include road construction projects. Road construction is clearly a "product of Indian industry." The statutory language is general and inclusive, not narrow. At the time of the Act, Congress knew that Indians were engaged in a great variety of federally encouraged productive enterprises (see p. 12, *infra*)—*including road construction.* For example, the 1908 Indian Appropriations Act specifically appropriated money for a road on the Hoopa Valley Indian Reservation, "the labor for said construction to be performed as far as practicable by the Indians of the Reservation." Act of April 30, 1908, 35 Stat. 70, 77.[3] The floor debate on this proviso stressed that Indians should be gainfully employed and paid for the work they do:

27 Stat. 612, 639; Act of August 15, 1894, c. 290, 28 Stat. 286, 312; Act of March 2, 1895, c. 188, 28 Stat. 876, 907; Act of June 10, 1896, c. 398, 29 Stat. 321, 348-49; Act of June 7, 1897, c. 3, 30 Stat. 62, 90; Act of July 1, 1898, c. 545, 30 Stat. 571, 595; Act of March 1, 1899, c. 324, 30 Stat. 924, 946; Act of May 31, 1900, c. 598, 31 Stat. 221, 246; Act of March 3, 1901, c. 832, 31 Stat. 1058, 1083; Act of May 27, 1902, c. 888, 32 Stat. 245, 273-74; Act of March 3, 1903, c. 994, 32 Stat. 982, 1006; Act of April 21, 1904, c. 1402, 33 Stat. 189, 216; Act of March 3, 1905, c. 1479, 33 Stat. 1048, 1077; Act of June 21, 1906, c. 3504, 34 Stat. 325, 326; Act of March 1, 1907, c. 2285, 34 Stat. 1015; Act of April 30, 1908, c. 153, 35 Stat. 70, 71; Act of June 25, 1910, c. 431, 36 Stat. 855, 861.

[2]*Glover Constr. Co. v. Andrus,* 591 F.2d 554, 560 (10th Cir. 1979).

[3]This project was no isolated instance. The Annual Report of the Commissioner of Indian Affairs for 1907 observes that near Phoenix, Arizona, "Indians have been constantly engaged in road construction under an Indian foreman, and a few have been employed as mechanics and in the cement work" (p. 12-13).

> "I know of no good reason why they [the Indians] should not be compensated. I believe, if you want to make responsible, self-respecting American citizens of these people, you ought to place them as nearly as possible upon a plane of right and justice with other people." 42 Cong. Rec. 2643 (1908) (remarks of Sen. Heyburn).

The historical context of the Buy Indian Act, moreover, indicates that its purposes were broadly remedial and in no way restrictive. While there was little congressional debate on the specific "Buy Indian" provisions themselves during the years between 1886 and 1910, the principles themselves that appear in general debate concerning Indian appropriations and Indian policy[4] confirm Judge McKay's observation, dissenting below, that:

> "[t]he obvious purpose of the Buy Indian Act is to encourage Indian economic development by freeing Indian industry from the competitive strictures of advertised bidding requirements."

591 F.2d at 563. The dominant Indian policy of this period was to "civilize" the Indians by converting them from hunters into farmers and laborers. In the final three decades of the nineteenth century, Congress repeatedly recognized that the game on which western tribes depended had been drastically diminished.[5] De-

[4]This Court has indicated on several recent occasions that a discussion of legislative and related materials which describe the historical setting for Indian statutes can be extremely useful in determining what meaning should be given the legislation. *Cf.* Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975).

[5]*E.g.*, Debate on the Indian Appropriations Act of 1896, 28 Cong. Rec. 2026 (1896) (remarks of Rep. Johnson of North Dakota).

prived of game, Indians became largely idle on the reservations where they had been confined, and dependent chiefly on the Government for support through rations, provisions and annuities promised in earlier treaties.

The centerpiece legislation of the period, the Allotment Acts,[6] sought to eradicate this idleness and dependency by encouraging productive labor. The incentive for labor was allotment of individual parcels of reservation land to each adult Indian. *See, e.g.,* F. PRUCHA, AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIAN, 1865-1900 (1976) (hereafter "Prucha"), ch. 8, esp. pp. 227-28, 242, 257. Each allottee was to work his own land, and through work to learn settler traditions and acclimatize himself to settler ways. *See generally* D. OTIS, THE DAWES ACT AND THE ALLOTMENT OF INDIAN LANDS, (1973), esp. pp. 15-18; *Mattz v. Arnett,* 412 U.S. 481, 496-97.

A primary theme in the Indian Appropriations Acts throughout this period was to train Indians to be self-supporting in "civilized occupations" so that they would no longer be dependent on the Government. For example, Representative Sherman of the House Committee of Indian Affairs, the manager of the 1908 Indian appropriations bill, stated:

> What we all desire, what we all hope for, is that ultimately the individual Indian will become a self-supporting and law abiding citizen, and, of course,

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[6]The General Allotment Act of 1887, 24 Stat. 388 (current version at 25 U.S.C. § 331 *et seq.* (1976)), was implemented by special statutes ratifying agreements with or unilaterally alloting lands of particular tribes. *See, e.g.,* Mattz v. Arnett, 412 U.S. 481, 497 & n.19 (1973).

> allotment is one of the necessary prerequisites for that end.
>
> 42 Cong. Rec. 1418 (1908).
>
> * * *
>
> The theory of ultimately ridding ourselves of the care and charge of the Indians is to give them allotments, put them in condition upon the allotments so they can be self-sustaining, thereby relieving ourselves of the burden and relieving them also of the handicap of any direct aid, and also relieving ourselves to a certain extent of the burden of caring for them.
>
> 42 Cong. Rec. 1694 (1908).

In debate concerning a provision funding the Carlisle Indian Industrial School,[7] Representative Olmstead quoted the following passages from the Board of Indian Commissioners' report to the Secretary of the Interior:

> "The present policy in the administration of Indian affairs may be characterized as a policy which emphasizes self-help, opens the way for it, and leads the Indians out from reservation life and tribal life into the economic, social, and civil life of American citizens."

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[7]Indian education in this period was also designed to produce self-reliance and reduce dependence on the Government. The Carlisle School was opened in 1879 at abandoned military barracks in Carlisle, Pennsylvania, with a vocational and manual labor curriculum, and became the prototype for a series of government operated manual-labor boarding schools for Indians. PRUCHA, pp. 274-79. As Prucha, a leading contemporary historian of Indian policy, concludes:

> The purpose of Indian education, ultimately, was to make the Indians self-supporting—not only as a means to advancing the individual's manhood but, quite practically, to bring an end to the enormous governmental outlays needed to maintain large numbers of Indians who had lost their old means of subsistence and had not taken up any new ones. [*Id.* at 270.]

Our honored Commissioner of Indian Affairs, Mr. Leupp, in his published report for 1906, at page 6, says:

"The feature of Indian civilization upon which the Office has laid its greatest stress during the year just past has been its policy for inducing the young and able bodied Indians who have no profitable work at home to leave their reservations and go out into the world to make a living as white men do."

And again, on page 12, he says:

"To push even a part of these Indians into actually earning money in a big, competitive world, where there are no rations, will do more than any other one thing could do to awaken the spirit of self-respect in which alone lies the doom of the ration system."

On page 13, speaking of the Zuni dam in New Mexico, he says:

"Here we have Indians employed on an Indian enterprise in an Indian reservation—conditions less desirable than those of outside employment, but much better than those obtaining, for example, inside of the Sioux reservations, where it has been necessary to contrive artificially new lines of work for the sake of keeping the Indians busy."[8]

Besides road construction work,[9] Indians in this period were engaged in farming,[10] logging and milling lumber,[11]

[8] 42 Cong. Rec. 1706–07 (1908). *See also* 33 Cong. Rec. 1353–54 (1900) (remarks of Mr. Stephens of Texas, Chairman of House Committee on Indian Affairs).

[9] *See* p. 8, *supra*.

[10] Instructors were brought onto reservations to teach the Indians to farm. This was seen as a key means in "instructing these

[footnote 10 continued following page]

[11] *See* 1909 CIA, p. 56.

construction of dams and irrigation projects and handling freight and constructing railroads,[12] all encouraged by the Government. The federal efforts to promote meaningful work for Indians were managed by a BIA employee, Mr. Charles E. Dagenett, a Peoria Indian, who was considered a model of what this policy was intended to accomplish:

> Mr. Chas. E. Dagenett, a Peoria Indian, is a conspicuous example of an Indian who has proven equal to a task usually assigned to white employees. He is a great factor in the development of his own race and of invaluable assistance to the Government as supervisor of Indian employment. His duty requires the finding of work for Indians and the finding of Indians for the work. He has been so successful that, beginning alone three years ago, it has been necessary to give him assistants located at different points in the Indian country. Under his intelligent supervision hundreds of Indians have been placed at work on railroads, irrigation ditches, in beet fields, and sundry employments for which their strength and abilities are equal. He is a type of Indian that the office is striving to develop—a self-supporting, self-respecting, useful American citizen.

Annual Report of the Commissioner of Indian Affairs, 1909, p. 6.

Amici submit that the language and historical context of the Buy Indian Act leave no doubt as to its extending

[footnote 10 continued from previous page]

Indians in civilized methods of earning a livelihood." 28 Cong. Rec. 2026 (1896) (remarks of Rep. Johnson of North Dakota). Indians were also employed as laborers on private off-reservation farms. *See, e.g.*, 1909 Report of the Comm. Ind. Affairs ("CIA"), p. 7; 1906 CIA, pp. 6–10.

[12] *See, e.g.*, 1908 CIA, pp. 29–31.

to road construction projects. But even if there were any question as to the statute's scope, this Court has repeatedly held that statutes enacted for the benefit of Indians are to be liberally construed in their favor. As this Court emphasized recently in *Bryan v. Itasca County*, 426 U.S. 373, 381 (1976):

> . . . [I]n construing this 'admittedly ambiguous' statute, *Board of Comm'rs v. Seber*, 318 U.S., at 713, we must be guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indian,' *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 79 (1918).

Accord, Wilson v. Omaha Indian Tribe, 442 U.S. ___, 99 S.Ct. 2529, 2537 (1979) ("'statutes passed for the benefit of dependent . . . Indian tribes are to be liberally construed'"); *Squire v. Capoeman*, 351 U.S. 1, 6 (1956) ("Doubtful expressions are to be resolved in favor of [Indians]"); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) ("The construction, instead of being strict, is liberal").

2. The decision below imperils numerous opportunities for productive employment by Indians and dramatically increases their dependence on the Government—the very evils sought to be avoided by the Buy Indian Act.

To be sure, federal Indian policy "has by no means remained constant" since the Buy Indian Act was enacted. *See Village of Kake v. Egan*, 369 U.S. 60, 71 (1962); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 171-73 (1973). The Indian policies of the turn

of the century—to acculturate Indians by encouraging productive labor while reducing dependence on the United States Government—have been replaced by broader goals of Indian economic development.[13] Yet, as President Nixon observed in his 1970 Message to Congress:[14] "[o]n virtually every scale of measurement—employment, income, education, health—the condition of the Indian people ranks at the bottom." *See also* AMERICAN INDIAN POLICY REVIEW COMMISSION, FINAL REPORT, Vol. I, 91-94 (1977).

Most significantly for present purposes, the very mischief that the Buy Indian Act sought to remedy—lack of opportunities for productive Indian employment and dependence on the federal government—is produced by the decision below. On most Indian reservations, the major employers are in the public sector—the United States Government (chiefly the Bureau of Indian Affairs) and the Tribe itself. Crippling poverty, high unemployment and inadequate education combine with the contin-

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[13] *See, e.g.*, Indian Financing Act of 1974, 25 U.S.C. §§ 1451 *et seq.* (1976); Indian Self Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.* (1976).

The policy of the Buy Indian Act—including the waiver of general advertising requirements and the preference for the Indian workers—has been specifically incorporated into the Indian Self Determination and Education Assistance Act. 25 U.S.C. 450e(b), 450j(a). Regulations to implement this provision have been promulgated. 44 Fed. Reg. 62,510, 62,513 (1979) (to be codified in 41 C.F.R. § 14.7). All solicitations and contracts covered by the Act must contain a clause stating that contractors will give employment preference to Indians and Indian subcontractors. 44 Fed. Reg. 62,513. For contracts over $50,000, where at least a portion of the work will be on or near a reservation, the contractor must also, among other things, solicit bids initially only from Indian firms and must accept a bid from an Indian firm, so long as a reasonable bid is received. 44 Fed. Reg. 62,513.

[14] 116 Cong. Rec. 23,258 (1970), 6 Weekly Comp. of Pres. Doc. 894 (1970).

uing effects of pervasive discrimination to stifle the ability of Indians to establish and operate private businesses successfully.[15]

Despite such handicaps, Indian tribes and individual entrepreneurs have established some private businesses which produce a variety of goods and services. The 1979 BUYERS GUIDE TO PRODUCTS MANUFACTURED ON AMERICAN INDIAN RESERVATIONS[16] identifies 91 private Indian manufacturing businesses, ranging in size from two to 672 employees. Together, they provide a vital mainstay for many tribal economies by employing thousands of Indians in the manufacture of goods ranging from wood products to printed circuit boards and precision machined metal components. In addition, tribes have established over a hundred tribally-owned enterprises, and individual Indians own several hundred non-manufacturing businesses (such as stores, gas stations, etc.).

The vast majority of these Indian companies are small businesses which suffer a chronically high failure rate. For struggling Indian companies, contracts negotiated under the Buy Indian Act can provide the margin of success needed to overcome the numerous obstacles to their survival. The dollar amounts contracted under the Buy Indian Act provide a very significant source of funds for Indian tribal and individual businesses.

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[15]A comprehensive 1979 listing of Indian-owned and controlled organizations and Indian consultants, for example, only located seven Indian accounting firms, twenty-eight Indian architectural firms and thirty-one Indian engineering firms. P. Bartow, [Pub. L. 93-] 638 Consultants (April 1979) (study done under Bureau of Indian Affairs Contract No. 9C50-0100211).

[16]Economic Development Administration, U.S. Dept. of Commerce and Bureau of Indian Affairs, U.S. Dept. of the Interior.

> In Fiscal Year 1972, of the total of 2,308 prime contract awards made by BIA, 1,332 or 57.7 percent were negotiated pursuant to the 'Buy Indian' Act. The dollar value of all prime contract awards aggregated $153,656,914; the 'Buy Indian' Act share represented 41.2 percent or $63,364,234.[17]

17 M. LUKACZER, THE FEDERAL BUY INDIAN PROGRAM 15 (1975).

In fiscal year 1977, Buy Indian construction contracts totalled $24,009,000 out of a total Bureau of Indian Affairs construction program of $78,962,000.[18] These funds supported ailing tribal economies and provided contracts which bonding difficulties often prevent tribally owned construction companies from obtaining elsewhere.[19] In addition to aiding individually owned Indian

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[17]These figures include contracts with tribes, and are the most recent comprehensive national figures available.

Buy Indian contracting operates under the requirements of 20 BIAM 1, a policy statement first issued by the Commissioner of Indian Affairs on March 3, 1976, which requires that contracts be let to the lowest Indian bidder and that the price be fair and reasonable. Buy Indian contracting often involves competition between Indian companies. For example, 12 of 13 Buy Indian contracts signed by the Sacramento Area Office of the BIA from July 1975 through January 1, 1980 involved competition. Telephone interview with Duane Marion, Sacramento Area Contracting Officer, January 2, 1980. In the Minneapolis Area, 14 of 17 construction contracts in Fiscal Year 1978 involved competition. Telephone interview with John Brorson, Area Contracting Officer, January 3, 1980.

[18]Interview with Donald J. Asbra, Chief, Contracting and Grants Administration Staff, Bureau of Indian Affairs, U.S. Department of the Interior in Washington, D.C. (December 14, 1979). As indicated at footnote 21 *infra* and accompanying text, this Buy Indian figure dropped sharply as a result of the injunction against Buy Indian road construction contracts entered in this case. In Fiscal Year 1978, Buy Indian construction contracts fell to $8,664,000.

[19]*See* footnote 22 *infra*.

construction firms, Buy Indian road construction contracts help tribes to build and maintain roads in areas not effectively served by any other governmental agency.[20]

Buy Indian road construction comprised $11,052,318 in Fiscal Year 1977, before plummeting to $2,267,711 in Fiscal Year 1978 as a result of the District Court injunction in this case.[21] The experience of the Standing Rock Sioux Tribe provides a dramatic example of how the decision below crippled a successful effort to help develop a reservation which has an unemployment rate exceeding 30 percent of the labor force.

The tribally-owned Standing Rock Road Construction Company ("Company") was chartered by the Standing Rock Sioux Tribe in 1977. The company purchased heavy road construction equipment, and during two years in operation, was a major economic enterprise on the Standing Rock Reservation, with a substantial number of Indian employees. The company was involved

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[20] Indian families living outside the Bureau approved network of roads have to rely on some other [entity] for road maintenance including snow removal. The Tribe uses their equipment to take care of these off network roads and other Tribal projects. However, in order to amortise [sic] their capital investment in road equipment they have contracted with the Bureau under the Buy Indian Act for road construction, and maintenance plus construction of plant facilities.

Letter from Loren J. Farmer, Assistant Area Director, Bureau of Indian Affairs, Aberdeen Area Office, to Hans Walker, Acting Associate Solicitor, Division of Indian Affairs, U.S. Dept. of the Interior (December 27, 1979).

[21] Affidavit of Forrest J. Gerard, Assistant Secretary of the Interior for Indian Affairs, February 1, 1979, attached to Application for Stay of Mandate Pending Certiorari before the Tenth Circuit Court of Appeals in this case.

in a number of reservation construction projects, including as a subcontractor, a new seven million dollar high school. After the court below rendered its decision in this case, however, the BIA stopped negotiating road construction contracts with Indian firms. Thus, the source of virtually all work done by the company ceased. Attempts to continue operations by seeking contracts through competitive bidding were futile,[22] and the company was forced to liquidate its assets and terminate operations in July, 1979.[23]

The impact of the decision below is not limited to construction contracts alone.[24] The experience of the Assiniboine and Sioux Tribes of the Fort Peck Reserva-

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[22] Private construction projects, outside the Buy Indian Act, customarily require bid bonds and performance bonds. These are not generally provided by private bonding companies to tribally-owned enterprises operating on reservations because state courts have no jurisdiction to enforce the terms of the bonds against Indian-owned enterprises on a reservation. *See generally* Bryan v. Itasca County, 426 U.S. 373 (1976); Fisher v. District Court, 424 U.S. 382 (1976) (*per curiam*); McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973).

[23] The Metlakatla Indian Community of the Annette Islands Reserve planned to enter into a contract with the Bureau of Indian Affairs for all future road construction on its Reserve, but these plans were suspended by the decision below.

[24] Since the Buy Indian Act clearly applies to roadway construction projects, the effect of the decision below cannot be limited to road construction alone, but necessarily threatens all Buy Indian contracts.

At the present time, there are over 500 Indian firms on the BIA's Indian bidders list, approximately one-quarter of which are construction contractors. Telephone interview with Donald J. Asbra, Chief, Contracting and Grants Administration Staff Bureau of Indian Affairs, U.S. Dept. of the Interior (January 4, 1980).

tion and the Metlakatla Indian Community illustrate the potential disruption of the decision on the economies of all tribes. The Assiniboine and Sioux Tribes have chartered three tribally owned enterprises—West Electronics, Assinboine and Sioux Tribal Industries and Fort Peck Manufacturing Company. These companies are successful business ventures which produce, among other things, electronic products and military camouflage materials. Under the Buy Indian Act, these companies during the past five years have obtained contracts totalling over $600,000. They have provided employment and on the job training for over 700 Indians during this period. If the decision below stands, these contracts may be discontinued or challenged in court.

The Metlakatla Indian Community of the Annette Islands Reserve established a tribal construction enterprise to increase tribal revenue and employment after major federal facilities on the Reserve were closed between 1973 and 1976.[25] In 1977, the Community agreed to provide a site on the Reserve for a new federal fish hatchery on the condition that the Community would have the right of first refusal to construct the hatchery under the Buy Indian Act through its tribally-owned construction enterprise. The enterprise has completed Phase 1 of the hatchery under a $1,123,010

[25]A major federal presence on the Reserve commenced during World War II and continued through 1977 in the form of the Federal Aviation Administration's (FAA) civilian jetport and Coast Guard installations. In 1974, FAA relocated its operations to Ketchikan, Alaska. In 1976-1977 the Coast Guard relocated its activities from the Reserve, admitting that its departure would have "a significant adverse socio-economic impact" on the Reserve. *See* Metlakatla Indian Community v. Adams, 427 F.Supp. 871, 874 (D. D.C. 1977).

Buy Indian contract and is currently completing Phase 2 under a $2,830,000 Buy Indian contract. It expects to contract with the Bureau under the Buy Indian Act in the next fiscal year for $2,701,000 to finish the hatchery.[26] These contracts are jeopardized by the decision below.

3. The principles reaffirmed in *Mancari* clearly control this case.

Since the Buy Indian Act must be read as encompassing a broad range of Indian employment and business activity, including road construction projects, the determination of the court below that the Federal Property Act's advertising requirements supersede the Indian preference of the Buy Indian Act violates the accepted rules of statutory construction reaffirmed in *Mancari.* As noted, pp. 5-6, *supra,* a decision to apply the advertising requirements would mean, in effect, that Congress intended to repeal the Buy Indian Act by implication when it enacted the Federal Property Act, and would conflict with the rule of statutory construction that a general statute should not be allowed to nullify a specific statute operating in very limited situation.

In *Mancari,* this Court also emphasized that every effort should be made by courts to reconcile different statutes on the same subject. Specifically, this Court held as follows:

> In the absence of some affirmative showing of an intention to repeal, the only permissible justifi-

[26]This project has thus far provided twelve jobs on the Reserve, significant training and experience for the tribal construction enterprise management and its employees, and constitutes, in addition, a key element in the effort to preserve the salmon fishery in northern Pacific waters.

> cation for a repeal by implication is when earlier and later statutes are irreconcilable. . . .
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> * * *
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> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . . The intention of the legislature to repeal 'must be clear and manifest.'"

417 U.S. at 550, 551. *Accord, Tennessee Valley Authority v. Hill,* 437 U.S. 153, 189-90 (1978).

The Buy Indian Act and the Federal Property Act plainly are reconcilable within the meaning of the *Mancari* analysis. First, nothing in the Federal Property Act or its legislative history speaks to repeal of the Buy Indian Act. Second, the congressional policies underlying each of the statutes do not conflict. According to the Court of Appeals' decision below, the Federal Property Act was enacted to enable federal agencies to obtain "the best and lowest bid for the benefit of the American taxpayers in 'high cost' construction categories . . . ." 591 F.2d at 562. The Buy Indian Act, while relating to contracts let by the Bureau of Indian Affairs, was intended by Congress to achieve very different objectives in a narrow area—encouragement of Indian labor and reduction of Indian dependency on the federal Government by freeing Indian industry from the competitive strictures of advertised bidding requirements. The legislation was in furtherance of the federal government's unique trust relationship with Indian tribes, and represented one of many such Indian preferences developed by Congress

for the purpose of bringing Indians into the economic mainstream of American life.[27] *Cf. Morton v. Mancari,* 417 U.S. at 550.

CONCLUSION

In light of the foregoing, *Amici* respectfully submit that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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[27] Significantly, in *Mancari,* this Court linked the Buy Indian Act directly to the Indian employment preference provision which was at issue there. *See* Morton v. Mancari, 417 U.S. at 538 n.2.

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